

No. 12862

United States
Court of Appeals
for the Ninth Circuit.

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. P. DUTTON AND
COMPANY, INC., a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

No. 11540-G

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMEL, E. P. DUTTON AND
COMPANY, INC., a Corporation, DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,
Defendants.

COMPLAINT FOR DECLARATORY JUDG-
MENT IN RESPECT TO COPYRIGHT
MATERIAL

Comes now the above-named plaintiff and com-
plains of the above-named defendants and for cause
of action alleges:

I.

This action is brought and commenced to deter-
mine the rights of the plaintiff herein, under the
provisions of the Copyright Laws of the United
States (Title 17 of the United States Code) to
publish and reproduce certain literary works and
writings upon which defendants claim a copyright
and the validity of which said claimed copyright
plaintiff disputes as to a certain portion of said
works and writings.

II.

That the above-named defendants Doe I, Doe II,

Doe III, Doe Company, a corporation, and Roe Company, a corporation, are sued herein under fictitious names, the true names of said defendants being unknown to plaintiff he requests and reserves the right to insert such true names by appropriate amendment when such true names are ascertained.

III.

That the above-named defendants, E. P. Dutton and Company, Inc., a corporation, Doe Company, a corporation, and Roe Company, a corporation, are regularly and duly organized and existing corporations, that the place of organization of said corporations and the laws under which said corporations are organized are well known to defendants but are unknown to plaintiff.

IV.

That over a period of years from the early 1920's to the early 1930's one Stewart Edward White, brother of plaintiff herein, compiled, wrote and/or caused to be compiled and written a certain manuscript which the said Stewart Edward White designated and called the "Gaelic" manuscript or the "Old Gaelic" manuscript. That said manuscript purports to be the transcribed communications of "Gaelic," an individual departed this world and who existed only in the spiritual non-material world, with the said Stewart Edward White on various and divers philosophical subjects and matters.

V.

That thereafter and prior to the death of the said

Stewart Edward White in the year 1947, the said Stewart Edward White wrote a book called "The Job" or "The Job of Living" based upon the "Old Gaelic" or "Gaelic" manuscript and directly quoted extensive portions of said "Gaelic" or "Old Gaelic" manuscript. That on or about the 20th day of October, 1944, the said Stewart Edward White transferred to defendant Susan C. Kimmel all his right, title and interest in and to said manuscript called "The Job" or "The Job of Living" together with several other manuscripts including the "Old Gaelic" or "Gaelic" manuscripts.

VI.

That during the year 1948, to wit in May, 1948, and in August, 1948, defendant Susan C. Kimmel through defendant E. P. Dutton and Company, Inc., a corporation, printed, published and sold to the general public in book form said "The Job" or "The Job of Living" manuscript under the title of "The Job of Living." That said defendants caused to be printed upon said book so published, printed and sold to the general public, the following words to wit: "Copyright 1948 by Susan Kimmel." Plaintiff is informed and believes and upon such information and belief alleges that the said defendants have caused said copyright to be registered in accordance with the statute in such cases made and provided.

VII.

Plaintiff is informed and believes and upon such information and belief alleges that the said defend-

ant, E. P. Dutton and Company, Inc., a corporation, has acquired through contract with defendant Susan C. Kimmel some right or interest in said copyrighted publication "The Job of Living," the exact nature of which said contract and right is well known to said defendants but unknown to plaintiff.

VIII.

Plaintiff is informed and believes that defendants Doe I, Doe II, Doe III, Doe Company, a corporation, and Roe Company, a corporation, claim some interest or right in and to said publication, "The Job of Living" under said copyright.

IX.

That prior to the year 1944 the said Stewart Edward White had dedicated and abandoned to the general public said "Old Gaelic" or "Gaelic" manuscript by the following acts:

(1) Reproduced said manuscript himself and distributed the same without charge and without limitation as to use or right to republish to more than eighteen persons.

(2) Permitted many persons to borrow copies of said manuscript and read and loan the same.

(3) Permitted one Margaret Oettinger of Palo Alto, California, to reproduce and sell to various persons a large number of copies of said manuscript during the year 1941 and thereafter.

(4) Permitted one Mrs. Terry Duce to reproduce, distribute and sell copies of said manuscript to her friends and acquaintances.

X.

That prior to the said 20th day of October, 1941, the said Stewart Edward White presented plaintiff with a copy of said "Gaelic" or "Old Gaelic" manuscript and told and informed plaintiff he might circulate the same in any manner he chose.

XI.

That plaintiff is in the process of writing and producing a book based upon said "Old Gaelic" or "Gaelic" manuscript and has and will quote extensively therefrom. That said quotations will include some of the material quoted in said copyrighted publication called "The Job of Living." That plaintiff intends to and will publish and sell to the general public his said book.

XII.

That a dispute has arisen between plaintiff and defendants relative to the right of plaintiff to quote from said "Old Gaelic" or "Gaelic" manuscript in his, plaintiff's, said proposed book and particularly relative to plaintiff's right to quote portions of said "Old Gaelic" manuscript quoted in said copyrighted publication "The Job of Living."

That in respect to said dispute plaintiff contends that said "Old Gaelic" or "Gaelic" manuscript had, prior to any assignment thereof to defendants or any of them, been dedicated to the general public by publication without notice or claim of copyright, and that plaintiff may therefore quote from said "Gaelic" or "Old Gaelic" manuscript any portion

thereof including those portions quoted in said "The Job of Living," in his said proposed book without infringing upon said copyright claimed by defendants and without violating said defendants' rights in any manner whatsoever.

That in respect to said controversy defendants claim and contend that any quotation by plaintiff from said "Old Gaelic" or "Gaelic" manuscript would be a violation of their rights therein and particularly that the quoting of any portion of the "Old Gaelic" or "Gaelic" manuscript quoted in said "The Job of Living" by plaintiff in his said proposed publication would be and will be a violation of defendants' rights under said claim of copyright and an infringement upon said copyright. That said controversy is actual, current and bona fide.

Wherefore, plaintiff prays judgment of the above-entitled court declaring the rights of the parties relative to said controversy above set forth and determining and adjudicating that said "Gaelic" or "Old Gaelic" may be quoted and used by plaintiff without infringement upon said copyright claimed by defendants upon said book "The Job of Living." Plaintiff further prays for costs of suit incurred herein and for such further general relief as is meet in the premises.

SCHAUER, RYON &
McMAHON,

By /s/ ROBERT W. McINTYRE,
Attorneys for Plaintiff.

State of California,
County of Santa Barbara—ss.

Harwood A. White, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled and foregoing Complaint for Declaratory Judgment in Respect to Copyright Material; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

/s/ HARWOOD A. WHITE.

Subscribed and sworn to before me this 22nd day of April, 1950.

[Seal] /s/ MARTHA E. BLANCO,
Notary Public in and for the County of Santa Barbara, State of California.

[Endorsed]: Filed April 28, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
SUSAN C. KIMMELL

Comes now the defendant, Susan C. Kimmell, and answering the Complaint for Declaratory Judgment in Respect to Copyright Material on file herein for herself alone and not for any other defendant, admits, denies, and alleges as follows:

I.

Answering paragraph I of said complaint this defendant admits the allegations therein contained.

II.

Answering paragraphs II and III of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraphs, and therefore denies the same.

III.

Answering paragraph IV of said complaint this defendant admits the allegations therein contained.

IV.

Answering paragraph V of said complaint this defendant admits the allegations therein contained except the allegation that the death of Stewart Edward White occurred in 1947, and in this connection alleges that the said Stewart Edward White died on September 18, 1946.

V.

Answering paragraph VI of said complaint this defendant admits the allegations therein contained except the allegation that the book entitled "The Job of Living" was published in May, 1948, and August, 1948; alleges that she is informed and believes that the first publication date of said book was June 4, 1948.

VI.

Answering paragraph VII of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph except that, under date of September 8, 1947, she entered into a written contract of publication with E. P. Dutton and Company, Inc., covering a work then known as "The Job," by Stewart Edward White, which was later printed, published, and sold under the title "The Job of Living."

VII.

Answering paragraph VIII of said complaint this defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph, and therefore denies the same.

VIII.

Answering paragraph IX of said complaint this defendant denies that prior to the year 1944, or at any other time, Stewart Edward White dedicated or abandoned to the general public the manuscript therein designated as "Old Gaelic" or "Gaelic" or

any part thereof by the acts therein mentioned or by any other acts.

Answering sub-paragraphs (1) and (2) of said paragraph IX, this defendant denies that the distribution of said manuscript by said Stewart Edward White was without limitation as to use or right to republish by any person or persons whomsoever; and in this connection alleges that the said Stewart Edward White distributed copies of said manuscript only to persons particularly interested in the subject matter thereof, and instructed them that neither the whole nor any part of said manuscript was to be reproduced by them, nor were they to permit such reproduction by printing or by making said manuscript available to the general public in any other way.

Answering sub-paragraphs (3) and (4) of said paragraph IX, admits that Margaret Oettinger and Mrs. Terry Duce were permitted by the said Stewart Edward White to reproduce copies of said manuscript by mimeograph and to distribute the same; and in this connection alleges that the said Stewart Edward White instructed them and each of them that copies of said manuscript were to be distributed by them only to persons particularly interested in the subject matter thereof, with the understanding that they, or the persons receiving such copies from them, were not to make such copies or any parts thereof available to the general public by printing or otherwise; and further alleges that she is informed and believes that said mimeographed

copies were distributed as alleged for a charge representing only the cost of the materials used in mimeographing the same.

IX

Answering paragraph X of said complaint this defendant admits that prior to October 20, 1944, the said Stewart Edward White gave to the plaintiff herein a copy of said "Old Gaelic" or "Gaelic" manuscript; alleges that she is without knowledge or information sufficient to form a belief as to the truth of the averment that the said Stewart Edward White told or informed the plaintiff that he might circulate said manuscript in any manner he chose, and therefore denies the same.

X.

Answering paragraph XI of said complaint this defendant admits the allegations therein contained.

XI.

Answering paragraph XII of said complaint this defendant admits that a dispute has arisen as alleged; denies that, with respect to said dispute, the said manuscript of "Old Gaelic" or "Gaelic" had, prior to October 20, 1944, or at any other time, been dedicated to the general public by publication without notice and claim of copyright; alleges that such publication of said manuscript as did occur was a limited and qualified publication, not resulting in the loss or surrender by the said Stewart Edward White of his common-law right of copyright or any other rights at common law or in equity with re-

spect thereto; alleges that any quotation from said manuscript or the book entitled "The Job of Living" would be a violation of the rights of this defendant therein both at common law and under copyright, and in this connection alleges that all the rights of the said Stewart Edward White with respect to said manuscript inure to this defendant by reason of the transfer to this defendant of said manuscript by the said Stewart Edward White on October 20, 1944, as alleged in paragraph V of said complaint.

XII.

This defendant further alleges that she will be damaged unless the plaintiff be restrained and enjoined from using said manuscript "Old Gaelic" or "Gaelic" or the book entitled "The Job of Living" in any manner or from quoting the whole or any part thereof.

XIII.

This defendant further alleges that she has necessarily employed counsel in the preparation and filing of this answer, and to represent her in the above-entitled matter.

Wherefore, this defendant prays judgment as follows:

(1) That the plaintiff take nothing by his complaint;

(2) That the plaintiff be restrained and enjoined from using said manuscript of "Old Gaelic" or "Gaelic" or the book entitled "The Job of Liv-

ing'' in any manner or quoting the whole or any part thereof;

(3) That full costs of suit, including a reasonable attorney's fees be awarded to her; and

(4) That this defendant have such further general relief as is meet in the premises.

/s/ LESLIE F. KIMMELL,
Attorney for Defendant.

State of California,
County of Orange—ss.

Susan C. Kimmell, being first duly sworn, deposes and says:

That she is one of the defendants in the above-entitled and foregoing matter; that she has read the foregoing answer on behalf of herself alone and not for any other defendant and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated on information or belief, and as to those matters she believes it to be true.

/s/ SUSAN C. KIMMELL.

Subscribed and sworn to before me this 23rd day of May, 1950.

[Seal] /s/ LESLIE F. KIMMELL,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 24, 1950.

In the United States District Court, Southern
District of California, Central Division

No. 11,540-Y Civil

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON & CO.,
INC., a Corporation, et al.,

Defendants.

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, By
THOMAS M. MULLEN,
Santa Barbara, California.

For the Defendants:

LESLIE F. KIMMELL,
Laguna Beach, California.

OPINION

Yankwich, District Judge:

Stewart Edward White,—to whom we shall refer as “White,”—as distinguished from the plaintiff, who will be referred to as such or as “the brother,”—was a successful writer of books on ethics and philosophy of a popular nature. Prior to his death in 1947, at Burlingame, California, he published, through well-known publishers, books with the

titles: "The Unobstructed Universe," "With Folded Wings," "The Stars Are Still There," "Anchors to Windward," "The Road I Know," "Across the Unknown," "The Betty Book." After his death, E. P. Dutton & Company published, in 1948, another book entitled, "The Job of Living," with the copyright in the name of the defendant, Susan Kimmell. This book embodied some communications from the spirit world which White claimed to have received chiefly through his wife, Betty, from a personality referred to as "Gaelic." In the book (1), White identified "Gaelic" as his and his wife's

"nickname for what seemed to us a single and definite personality, apparently detailed to tell us what made the wheels go round. The material that came through Betty at that time, by and large, was inspiration, stimulus to growth and expression, with only enough explanation as to mechanics to give direction. Through 'Gaelic' our intellectual curiosities were given a certain satisfaction, on the principle that a reasonable measure of knowledge is a buttress to faith. These sessions were rare, and seemed to come only at times when one or another of a certain few people were present and in mental quandary."

The material so received was, during his lifetime, reduced to manuscript form by various reproduction processes and designated as the "Gaelic manuscript," which purported to give the communications by "Gaelic" with added comments by White.

"The Job of Living" contained portions of the manuscript.

On October 20, 1944, White executed a Bill of Sale transferring to the defendant Kimmell all his right and title to certain designated works, including the old and new "Gaelic manuscripts," "with the right to publish or otherwise use said manuscripts, in any way which she in her sole judgment shall determine."

The plaintiff, White's brother and a resident of Santa Barbara, California, in a complaint for declaratory judgment (2), seeks a declaration that both manuscripts, "Gaelic" and "Old Gaelic," are in the public domain and may be quoted without infringement either of the copyright claimed by the defendant Kimmell on "The Job of Living," or the common-law proprietary rights claimed under the Bill of Sale. This is resisted by the defendant Kimmell, who asserts that she is the owner of the manuscript and the material contained therein, whether published or unpublished. She seeks a declaration to that effect, and an injunction prohibiting the plaintiff from using any portion of the manuscript of "Old Gaelic" or "Gaelic" or "The Job of Living." The plaintiff's claim is bottomed upon the contention that, in his lifetime, and prior to the execution of the Bill of Sale in 1944, and to the publication of "The Job of Living," White allowed the unrestricted publication of the material and it is now in the public domain.

I.

The Meaning of "Publication"

The pleadings are broad enough to cover the rights to both the unpublished portions of the manuscript and "The Job of Living." The declarations sought by both parties would cover all the material, either published or not. In truth, however, what plaintiff seeks, not by reason of his relationship to White, but as a member of the public, is the right to reproduce the unpublished portion of the "Gaelic manuscript."

As the unpublished material is not copyrighted, the question of ownership must be determined by common-law principles. The common law has long recognized a property right in the products of man's creative mind, regardless of the form in which they took expression. For this reason, literary compositions and philosophical speculations, whether they are presented as the original work of the author or are claimed to have been transmitted to him through one of the many forms of inspiration that have come to be recognized as the source of intellectual production, are treated as a kind of property. (3) And the author has property in his manuscript which will be protected by the courts against anyone who seeks to deprive him of it, either by securing an unauthorized copy of it or by publishing it. The right exists until the author permits a general publication. (4) The following language of the Supreme Court is a pithy summary of the principles just adverted to:

“At common-law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common-law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority.” (5) (Emphasis added.)

What constitutes general publication has given the courts much concern. The Supreme Court has adopted as its own the following criterion for determining the matter:

“It is a fundamental rule that to constitute publication there must be such a dissemination of the work of art itself among the public, as to justify the belief that it took place with the intention of rendering such work common property.” (6)

The publication, to be effective as a dedication, must be a general publication. A limited publication which communicates the contents of a manuscript to a definite group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a “limited publication,” which does not result in loss of the author’s common-law right to his manuscript. (7)

An early American case contains a very clear statement of the conditions which render a publication limited in nature:

“The distinction between a public circulation of written copies, and a restricted or private

communication of their contents, was, for some purposes, recognized before the use of printing.

* * * But, except under special and unusual circumstances, an author who then parted with a manuscript copy gave to it the most public circulation of which it was capable. Now, the parting by an author with manuscript copies of his unprinted composition is ordinarily regarded as an act of mere private circulation. * * *

Printed copies also may be circulated privately. Their circulation is thus private when they are delivered to a few ascertained persons only, who receive them under conditions expressly or impliedly precluding any ulterior diffusion of the knowledge of their contents. Such a case occurs when a small first edition of a book, printed with a notice on the title page that it is for private circulation, is gratuitously distributed by the author among particular persons. Mr. Justice Talfourd, when at the bar, issued in this manner the first impressions of his tragedy of *Ion*. Here the restrictions were expressly defined. It may, in other cases, be implied from the selection of the persons, and from the method or attendant circumstances of the delivery. * * * The circulation must be restricted both as to persons and purpose, or it cannot be called private." (8) (Emphasis added.)

One of the older authorities on the law of property in intellectual productions has summed up the

rights of the author of an unpublished book in this manner: (9)

“He has a right to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his manuscript to another person, without parting with his literary property in it. He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies.”
(Emphasis added.)

From this, it is evident that, in determining whether a publication is general or special, the test is

“whether it is or is not such a surrender as permits the absolute and unqualified enjoyment of the subject matter by the public or the members thereof to whom it is communicated.” (10)

The case from which the foregoing quotation is taken epitomizes the law in this manner:

“A general publication consists in such a disclosure, communication, circulation, exhibition, or distribution of the subject of copyright, tendered or given to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person

entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class, or he may expressly or by implication confine the enjoyment of such subject to some occasion or definite purpose. A publication under such restrictions is a limited publication, and no rights inconsistent with or adverse to such restrictions are surrendered. Restrictions imposed upon the use prior to publication protect the copyright. Such restrictions imposed after publication cannot affect the public rights acquired by reason of the fact of publication. The nature of the subject-matter, the character of the communication, circulation, or exhibition, and the nature of the rights secured, are chiefly determinative of the question of publication." (11)
(Emphasis added)

Implicit in these rulings is the thought that if the circumstances show an intent to communicate the contents of the manuscript to a designated group and for a specified purpose, and does not extend to the public, at large, the publication is limited. For this reason, the private circulation of an original manuscript or copies of it

"is not a publication unless it amounts to a general offer to the public." (12)

Limited publication, as defined by these authorities, is, in its effect, no more than the exhibition of a painting, the representation of a play, or the giving of a lecture,—none of which destroys the right

of common-law ownership or confers the right to unrestricted reproduction or circulation.

II.

Limited Publication

Tested by the principles just referred to, the evidence in this case shows no intention to dedicate any portion of the "Gaelic" manuscripts to the public. And this conclusion may be drawn from the evidence on behalf of the plaintiff, which consisted of his own testimony, that of White's former secretary, W. N. Maguire, and the depositions of Margaret Oettinger and Harriet W. Jones.

The plaintiff and the former secretary testified generally that in 1933 and 1934, copies of the manuscript made by what was referred to as the "ditto process," were sent out from White's office to certain persons interested in the ideas which White had believed in, and which he had made popular through his books. But they admitted that the persons to whom the copies were sent were persons whose names had been sent in by friends or as persons interested in the ideas or belonging to the small elite who were studying them. No copy was ever placed in a public library, a reading room or on the shelf of a book store or club, where it was made accessible to anyone who wished to look at it. Nor were any copies offered for sale. Mrs. Oettinger was permitted to make a copy for herself, and she stated, in her deposition, that in 1941, she distributed some thirty copies. But it was evident from her own testimony that in her discussion with

White, she had referred to the fact that she wished to make copies "for two or three people." Whereupon, he suggested that he knew other people who might want them, and so he authorized her to make the copies. As she was not a woman of means, he authorized her to charge such persons as were referred to her two dollars for the cost of mimeographing. Her testimony in this respect is very revealing:

"Q. And was there any statements at that time made with respect to where you would sell or distribute the manuscripts which you made, or the copies which you made?

"A. No. I hadn't had very much experience with it at that time, and I knew of two or three people who wanted copies and that is all I knew about it, that two or three people wanted copies, and he said he knew several people who would like to have copies, and he gave me from time to time the names of people who would like to have copies of this manuscript. Several of the copies I disposed of were sent to people whose names were given to me by Mr. White.

"Q. Did you have a copy of the manuscript before you went to see Mr. White?

"A. Yes. I had borrowed a copy from Mrs.—Dr. Benner, I can't think of her name was—Katherine Benner.

"Q. Did she have several copies?

"A. I think she only had one. She might

have—I don't know whether she had more than one or not." (13)

While the witness sought to give the impression that she was given *carte blanche* to reproduce and distribute at will, the excerpt just quoted shows strictly the limitations which were imposed. Her own testimony and the testimony of others show that any of the names sent to her were selected by others, including the defendant. Mrs. Harriet White's deposition stated that White had told her that he had given Mrs. Oettinger permission to "pass out" the material and that she secured two or three copies for two dollars each. Despite the attempt of this witness to prove permission "to sell," the pattern which emerges is that of a selected group of persons recommended either by White or the others who were interested in the philosophical or ethical principles that he was preaching, who were given access to the manuscript. These are distinguishing marks of private distribution.

III.

The "Gaelic" Manuscripts Are Not in Public Domain

The New York Court of Appeals, in a case which has already been cited, while holding that the facts in the particular case showed a general publication, laid down the indicia of private distribution, in language which is very appropriate to the discussion here:

"* * * If a book be offered gratuitously to

the general public, it will constitute publication. This may be done by presenting it to public libraries, and this is so because the author or publisher, by that act, puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication is stated in the last part of the rule as follows: 'So that any person may have an opportunity of enjoying that for which copyright is intended to be secured.' * * * Several cases have arisen where the courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, supra; also *Bartlette v. Crittenden*, 4 McLean, 300 Fed. Case No. 1,082, where the plaintiff, a teacher of bookkeeping, for the convenience of his pupils, wrote his system of instructions on separate cards, which they were permitted to keep for their convenience. So a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to a publication. *Dr. Paley's Case*, cited in 2 Ves. & B. 23, was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. Coppinger, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion: 'The distinction is in the limit of the circulation. If limited to friends

and acquaintances, it would not be a publication; but, if general, and not so limited, it would be.” (14) Emphasis added.)

And the limitation which makes the publication private does not relate to numbers of persons, but to the type of persons and the purpose of communication. If limited to friends or acquaintances, or persons having a common interest in a publication, or in the ideas which it expresses, the limitation is effective, although, in reality, a large number of copies may be circulated. In a New York case, involving the question whether the distribution of reprints of a copyrighted article without an indication of the copyright was a waiver of the copyright, it appeared that thousands of reprints were distributed to the author's patients with instructions to call the article to the attention of others. Reprints were kept in the author's reception room where they could be examined or carried away by persons visiting the establishment. Nevertheless, the Court held that the copyright was not thereby lost, saying:

“The primary purpose of the distribution was to give information to persons interested in the subject discussed by the articles, and to relieve Schellberg of the necessity of orally explaining his system of treatment to those who might wish to learn about it.” (15)

So, here, the inference can be drawn, even from the testimony on behalf of the plaintiff, that the object of distribution was not to dedicate the contents of the “Gaelic” manuscript to the public, but

to communicate to a few persons interested in the subject,—kindred spirits, as it were, the philosophy it taught. Indeed, the testimony showed that the manuscript originated in part, from written answers which had been given to questions propounded by readers of White's other books. We clearly have a person who promulgates a certain philosophy and makes it possible for some of those interested in it to see its exposition, by permitting them to have for their own use a privately mimeographed copy of an unpublished manuscript. The manuscript is, therefore, the equivalent of the notes which a student makes of a lecture. The lecturer, by permitting him to make the notes and take them away, does not lose his right to later copyright the material.

From the very beginning of the development of this branch of the law, it has been conceded that circulation among students does not destroy the common-law right of the author, in one of the old cases, (16) the Lord Chancellor made the following observations:

“Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that; but it never was understood that those lectures could be published;—and so with re-

spect to any other lectures in the university, it was the duty of certain persons to give those lectures; but it never was understood that the lectures were capable of being published by any of the persons who heard them.”

And all those who have followed Blackstone and combined teaching with writing, whether in the field of law or others, have had the benefit of the rule. (17)

We add that other evidence in the record supports the conclusion that there was no general publication. As the plaintiff leans heavily on the deposition of Mrs. Oettinger, it is very significant that on the copy of the manuscript which she produced with the deposition, there was the printed legend “Reproduced by permission of Steward Edward White.” Such an inscription contradicts the design to publish to the world at large. For if the object be to release the material to the public, the statement of permissive reproduction is meaningless. Its appearance on the manuscript indicates the limited purpose of the permission granted. White, in reporting on November 18, 1940, to the defendant his understanding with Mrs. Oettinger, wrote:

“Just a hasty note, before you do any work copying Gaelic. Yesterday afternoon some people were here from Palo Alto who are so stuck on Gaelic that they want to copy it in mimeograph. They asked (a) whether I was willing; (b) if so, would I mind their pass—it around

among such of their friends who want copies, (c) if so, again, whether I would mind their charging such people the exact cost. I approved. So, if you write them, you might get one of those copies. Name: Mrs. Frank Oettinger, RFD #1, Menlo Park, Cal.” (18)

This is a contemporaneous statement, and is very persuasive as to what the understanding was. In a letter dated May 18, 1945, to Mrs. Oettinger, he indicates that the right to copy did not imply the right to publish in general:

“As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Kelkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.” (19)

White had published many books in his lifetime. So, when he spoke of reserving “publication” rights, as he did in the Bill of Sale and in this letter, he used the words in the sense in which they are used in the law of literary property, with which he was familiar. Otherwise put, he was determined that the permission granted did not result in a general publication.

And, in a letter written on October 26, 1944, to the defendant a few days after the Bill of Sale was executed, White spoke about his brother’s possible attempts to assert rights to the “Gaelic Manu-

script," and gave that as his reason for protecting her against

"what might be a disagreeable situation. The sort of squabble that just might arise if, after I die, he should rise and howl and attempt to do his own Gaelic, and show active resentment about an 'outsider' having the say over him, etc., etc., you can imagine as well as I." (20)

The deposition of Ivy Oneita Duce, relating to her conversation with White, offers positive proof of the fact that strict limitations were imposed upon all persons who were given the right to copy the "Gaelic" manuscript, (21) as does also the deposition of Don E. Stevens.

These occurrences, ranging over a period of years, are not, as the brother contends, mere self-serving declarations which seek to explain after the act, what was done; they are a consistent series of statements showing a clear design on White's part to limit communication. It is true that, notwithstanding such design, it was still possible for those to whom permission was given to destroy the effect of limitations by unlimited general distribution. (22) But this, fortunately, did not occur. Even those who would now generalize the limited right they received, testify to the observance of the limitation. The most conservative estimate of the number of copies distributed does not exceed 75. And, as already appears, this distribution was to designated persons. None was made to a public institution where the public had access to it. None was sold. And the case before us comes clearly

within the rule stated in *Bartlette v. Crittenden* (23):

“To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it, than it would be a transfer or abandonment of an exclusive right to republish, to give the copy of a printed work. In his treatise on Equity, (Section 943) Mr. Justice Story says, ‘In cases of literary, scientific, and professional treatises in manuscript, it is obvious that the author must be deemed to possess the original ownership, and be entitled to appropriate them to such uses as he shall please. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person, or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited, in point of right, use and effect, to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication, to which the receiver may choose to devote them.’ And he says, to prevent the publication of manuscripts, without the consent of the author, an injunction should be issued.”

The conclusion is therefore inescapable that there was no general publication of the “Gaelic” manuscript.

The consistency with which the courts for over a century and a half have upheld an author’s common-law right to his manuscript and the ardor

which they have shown to protect his rights, despite limited publication, is one more indication of the healthfulness of the common-law system and the determination of the courts to use their powers, aided by equitable principles, to protect intellectual products against piracy. No reason exists why we should depart from these strict standards. In these days of quick communication of ideas, a rule which would make a limited disclosure, such as occurred in this case, synonymous with publication would deny to the creator in the intellectual field the right to the product of his creative imagination. This would be harmful to the development of ideas. For, if we encourage piracy, we discourage creative minds from sharing, in a restricted manner, their ideas before their full fruition. The policy of the law, in protecting intellectual products, is to encourage productivity. (24) A protected limited sharing may enhance it by giving additional time for a fuller development. A weakening of this right might result either in premature publication or a total withholding of ideas, under fear of injury to the author's ownership in them. Either would be a loss to the creative spirit, which the courts should not consciously encourage.

Judgment and declaration will, therefore, be for the defendant that the "Gaelic" manuscripts are not in the public domain, and that the defendant is their sole owner.

Injunction will issue enjoining the plaintiff from using it in any manner.

Costs, but not attorney's fees, will be allowed the defendant.

Dated this 6th day of December, 1950.

/s/ LEON R. YANKWICH,
Judge.

NOTES TO TEXT

1. Stewart Edward White, *The Job of Living*, 1948, p. 22.

2. 18 U.S.C., Secs. 2201-2202.

3. 18 C.J.S., Copyright and Literary Property, Secs. 4-10; Amdur, *Copyright Law and Practice*, 1936, pp. 30-31; California Code of Civil Procedure, Sec. 980. And see: *Wheaton v. Peters*, 1834, 8 Pet. 591, 657-658; *Bobbs-Merrill Co. v. Straus*, 1908, 210 U. S. 339, 346; *Moore v. Ford Motor Co.*, 2 Cir., 1930, 43 F(2) 685, 686; *Echevarria v. Warner Bros. Pictures, Inc.*, 1936, D. C. Cal., 12 F. Supp. 632, 634; *Supreme Records, Inc. v. Decca Records*, 1950, 90 F. Supp. 904, 906; *Loew's Inc. v. Superior Court*, 1941, 18 C(2) 419, 421; *Yadkoe v. Fields*, 1944, 66 C.A. (2) 150, 160; *Johnston v. Twentieth Century Film Corporation*, 1947, 82 C.A. (2) 796, 807-808.

Our Court of Appeals has summed up the principle in one brief sentence:

"Literary property is not distinguished from other property and is subject to the same rules and is likewise protected." (Emphasis added.) *Universal Pictures v. Harold Lloyd Corp.*, 1947, C.A. 9, 162 F(2) 354.

4. *Bartlette v. Crittenden*, C.C. Ohio, 1849, Fed. Cas. No. 1076, 2 Fed. Cas. p. 967; *Press Publishing Co. v. Monroe*, 1896, C.A. 2, 72 Fed. 196, 199; *Caliga v. Inter-Ocean Newspaper*, 1909, 215 U. S. 182, 188; *Moore v. Ford Motor Co.*, *supra*, p. 686; *Nutt v. National Institute*, etc., 1929, C.A. 2, 31 F(2) 236, 238.

5. *Caliga v. Inter-Ocean Newspaper*, 1909, 215 U. S. 182, 188.

6. *American Tobacco Co. v. Werckmeister*, 1907, 207 U. S. 284, 299-300, quoting, with approval, Slater on the Law of Copyright and Trademark, p. 92.

7. *Abernethy v. Hutchinson*, 1824, 3 L.J. Ch. Reports 209; *Prince Albert v. Strange*, 1849, 2 De Gex & S.M., 652, 41 Eng. Rep. (Reprint) 1171; *Prince Albert v. Strange*, 1849, 1 Mc. & G. 25, 64 Eng. Rep. (Reprint) 293; *Werckmeister v. American Lithographic Co.*, 1904, 2 Cir., 134 Fed. 321, 325 *Jewelers' Mercantile Agency v Jewelers' Weekly Publishing Co.*, 1898, 155 N. Y. 241; 49 N.E. 872; *Kurfiss v. Cowherd*, 1938, 233 Mo. App. 347, 121 S.W(2) 282; *Waring v. WDAS Broadcasting Co.*, 1937, 327 Pa. St. 433, 194 Atl. 631; *Berry v. Hoffman*, 1937, 125 Pa. Sup. 261, 180 Atl. 516.

8. *Keene v. Wheatley*, C.C. Pa., Fed. Cas. No. 7644, 14 Fed. Cas. 180, 191.

9. Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Products*, 1879, pp. 102-104.

This test has been repeatedly cited with approval by the courts. And see, *Bobbs-Merrill Co. v. Straus*, supra, p. 18; *Werckmeister v. American Lith. Co.*, supra, p. 324.

10. *Werckmeister v. American Lith. Co.*, supra, p. 325.

11. *Werckmeister v. American Lith. Co.*, supra, p. 326.

12. *Werckmeister v. American Lith. Co.*, supra, p. 325.

13. Deposition of Margaret Oettinger, Plaintiff's Exhibit No. 4, pp. 5, 6.

14. *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Co.*, supra, p. 875.

15. *Schellburg v. Empringham*, 1929, D.C. N.Y., 36 F(2) 991, 992.

16. *Abernethy v. Hutchinson*, supra, p. 215. And see, *Nutt v. National Institute, etc.*, 1929, C.A. 2, 31 F(2) 236, 238.

17. *Nutt v. National Institute, etc.*, 1929, C.A. 2, 31 F(2) 236; *Waring v. WDAS Broadcasting Co.*, 1937, 327 Pa. 433, 194 Atl. 631.

18. Defendant's Exhibit A.

19. Plaintiff's Exhibit 3.

20. Defendant's Exhibit C.

21. Defendant's Exhibit D, Deposition of Ivy Oneita Duce, from which we quote:

“Q. Now, did Mr. White ever give you permission to make copies of that manuscript?

“A. Well, I just started explaining to you what happened. He told me I could write to this Mrs. Oettinger and get a copy from her, and I wrote to her and she informed me that she had no more copies but that she had some stencils and that they were very badly worn but that if I wished to I could make some copies from these stencils. So then, as I remember it, I wrote to Mr. White and asked him about it, and he said to me that it was perfectly all right for me to make a few copies but they were to be limited and that I was only to allow a few of my close friends to see them, that I must be very careful, in fact, to whom I showed them, because since they had not been published anybody could, you might say, steal the material; and naturally I wanted to protect his manuscript from anything like that. So I had these two or three friends here who were studying like I was, and we sent up to the lady and she sent us the stencils. And I had no mimeograph machine, and a Mrs. Cuthbert had a mimeograph machine and she turned out, as well as I can remember, about ten copies. I know she had to remake or recut some of the stencils, they made such bad copies. * * *

“Q. And what happened to them?

“A. And I still have three of them. And, as I said. I have not referred to them for years, because I, myself, went into the study of mysticism, which goes far beyond occult phenomena,

and I have just very occasionally read a few paragraphs of it to some of my students who might be puzzled about something. I have three copies, as well as I know, on my shelf, and Don Stevens received one and we sent one to Mr. Stewart White because he said he was out of copies at the moment. He had loaned his out and didn't have any at the moment. And I believe Mrs. Cuthbert got one and Mrs. Ahlstrand and Mrs. Simpson got one, and I think we sent one to Mrs. Oettinger. * * *

"Q. Now, those people who received copies were known to Mr. White, were they not? * * *

"A. He knew who they were.

"Q. He knew who they were, and you had his permission to give them a copy?

"A. Oh, yes.

"Q. In other words, it was not left to you to distribute to——

"A. Oh, no, because he had adjured me to be very careful as to who saw it, because he didn't want this material to fall into the hands of unprincipled people.

"Q. In other words, I take it that you were given very definite instructions that no one except selected groups or individuals could peruse that matter or even see it?

"A. Very definitely." (pp. 8-11..) (Emphasis added.)

22. Cf. *Kurfiss v. Cowherd*, 1938, 233 Mo. App. 397, 121 S.W.(2) 282, 287-288; *Larrowe-Loisette v. O'Laughlin*, 1898, C.C. N.Y., 88 Fed. 896.

23 *Bartlette v. Crittenden*, 1849, C.C. Ohio, Fed. Cas. No. 1076, 2 Fed. Cas. 967.

24. The American law of copyright stems from the power conferred upon the Congress by the Constitution "to promote the progress of science and useful arts." (Constitution of the United States, Article I, Sec. 8.) And, as cases discussed in this Opinion indicate, the common-law right to literary property precedes the constitutionally authorized protection and was not in any way affected by the enactment of the copyright laws, except that one availing himself of the copyright laws loses the corresponding common-law rights. See *Bobbs-Merrill Co. v. Straus*, 1908, 210 U. S. 339, 346-349; *Loew's Inc. v. Superior Court*, 1941, 18 C(2) 419, 421-425.

[Endorsed]: Filed December 6, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 29th day of November, 1950, in the court-room of the Honorable Leon R. Yankwich, Judge Presiding, Schauer, Ryon and McMahon, by Thomas M. Mullen, appearing as counsel for the Plaintiff, Harwood A. White, and Leslie F. Kimmell appearing as counsel for the Defendant, Susan C. Kimmell, and the Court having heard the testimony and having examined proofs offered by the respective parties, and the

cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its findings of fact as follows:

Findings of Fact

I.

That each and all of the allegations and denials set forth in the answer of the Defendant, Susan C. Kimmell, to the complaint of the Plaintiff are true.

II.

That Stewart Edward White, during his lifetime, put into written form certain communications from a personality in the nonmaterial or spirit world who was referred to as "Gaelic"; that the said Stewart Edward White called said written form of the communications the "Old Gaelic" manuscript; that subsequently the said Stewart Edward White embodied a portion of the "Old Gaelic" manuscript, together with his own comments and explanations, in a second manuscript which he called the "New Gaelic" manuscript, or "The Job" manuscript.

III.

That the said Stewart Edward White transferred to Defendant, Susan Kimmell, all of his right, title and interest in the "old Gaelic" manuscript and the "New Gaelic," or "The Job" manuscript by a bill of sale, dated October 20, 1944.

IV.

That in 1948, subsequent to the death of the said Stewart Edward White, the "New Gaelic" or "The

Job'' manuscript was published in book form by E. P. Dutton & Co., Inc., under the title "The Job of Living"; that the statutory copyright to said book was taken in the name of Susan Kimmell, the Defendant herein; and that said book was offered for sale to the general public.

V.

That during the lifetime of the said Stewart Edward White he made copies of the "Old Gaelic" manuscript by the "Ditto" process and distributed said copies to persons particularly interested in his teachings and philosophy and in the subject-matter of said manuscript, but not to the general public without discrimination as to persons; that subsequent thereto, and during the lifetime of the said Stewart Edward White, Margaret Oettinger and Ivy Oneita Duce, also known as Mrs. Terry Duce, with the permission of the said Stewart Edward White, made additional copies of said "Old Gaelic" manuscript by the mimeograph process and distributed said copies to friends and persons particularly interested in the teachings of the said Stewart Edward White and in the subject-matter of said manuscript, but not to the general public without discrimination as to persons; that said permission was given to the said Margaret Oettinger and the said Ivy Oneita Duce to reproduce and distribute said copies on the condition that the whole or any part of the contents thereof be not published and distributed to the general public; that the said Margaret Oettinger and the said Ivy Oneita Duce, with the permission

of the said Stewart Edward White, collected from the persons to whom said copies were delivered proportionate amounts not to exceed the actual cost of materials used in the mimeographing thereof; that the total number of copies of said manuscript produced and distributed by the said Stewart Edward White, the said Margaret Oettinger, and the said Ivy Oneita Duce did not exceed 75 copies.

VI.

That copies of said "Old Gaelic" manuscript were not at any time or at any place made available to the general public without discrimination as to persons by being placed in a public library, in a reading-room, in a commercial lending-library, or in a retail book-store, or by being otherwise offered for sale.

VII.

That the allegation set forth in sub-paragraph (1) of paragraph IX of the complaint of the Plaintiff that the said Stewart Edward White distributed said "Old Gaelic" or "Gaelic" manuscript to more than 18 persons without limitation as to the use or right to republish is not true and does not constitute a dedication of said manuscript to the general public; that the allegation set forth in sub-paragraph (2) of said paragraph IX that the said Stewart Edward White permitted many persons to borrow copies of said manuscript and to read and loan the same is not true in so far as the words "many persons" imply the general public, and does not constitute a dedication and abandonment of

said manuscript to the general public; that the allegation set forth in sub-paragraph (3) of said paragraph IX that the said Stewart Edward White permitted the said Margaret Oettinger to sell to various persons a large number of copies of said manuscript during the year 1941 and thereafter is not true and does not constitute a dedication and abandonment of said manuscript to the general public; and that the allegation set forth in sub-paragraph (4) of said paragraph IX that the said Stewart Edward White permitted the said Mrs. Terry Duce to sell copies of said manuscript to her friends and acquaintances is not true and does not constitute a dedication and abandonment of said manuscript to the general public.

VIII.

That the allegation in said paragraph X of the Plaintiff's complaint that the said Stewart Edward White told and informed the Plaintiff that he might circulate the "Old Gaelic" manuscript in any way he chose is not true.

IX.

That the Plaintiff is in the process of writing a book based upon said "Old Gaelic" manuscript which he intends to publish and sell to the general public; that he threatens to quote extensively from said "Old Gaelic" manuscript and also to quote from said book "The Job of Living" in writing such book.

X.

That an actual, current, and bona fide controversy

has arisen between the Plaintiff and the Defendant relating to the right of the Plaintiff to quote from said "Old Gaelic" manuscript and from said book "The Job of Living."

From the foregoing facts the Court concludes:

Conclusions of Law

I.

That the distribution of said "Old Gaelic" manuscript by the said Stewart Edward White, the said Margaret Oettinger, and the said Ivy Oneita Duce was a limited, qualified, and private publication, and was not a general publication.

II.

That the Defendant, Susan C. Kimmell, is entitled to judgment and declaration that the said "Old Gaelic" manuscript is not in the public domain and said "New Gaelic" or "The Job" manuscript was not in the public domain when the book "The Job of Living" was published and copyrighted in 1948.

III.

That the Defendant, Susan C. Kimmell, is entitled to judgment and declaration that she is the sole owner of said "Old Gaelic" manuscript, and was the sole owner of said "New Gaelic" or "The Job" manuscript when said book "The Job of Living" was published in 1948, and is now the sole owner thereof.

IV.

That the Defendant, Susan C. Kimmell, is entitled

to an injunction perpetually enjoining and restraining the Plaintiff, Harwood A. White, from using said "Old Gaelic" manuscript, said "New Gaelic" or "The Job" manuscript, and said book "The Job of Living" in any manner and from quoting the whole or any part of said manuscripts and said book.

V.

That the Defendant, Susan C. Kimmell, is entitled to judgment for her costs and disbursements incurred and expended herewith.

Let judgment and declaration be entered accordingly.

Dated this 27th day of December, 1950.

/s/ LEON R. YANKWICH,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 27, 1950.

United States District Court, Southern District of
California, Central Division

No. 11540-Y

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND
COMPANY, INC., a Corporation; DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,
Defendants.

JUDGMENT AND DECLARATION THAT
CERTAIN MANUSCRIPTS ARE NOT IN
THE PUBLIC DOMAIN, THAT THE DE-
FENDANT, SUSAN C. KIMMELL, IS THE
SOLE OWNER THEREOF, AND RE-
STRAINING THE PLAINTIFF FROM
USING AND QUOTING FROM SAID
MANUSCRIPTS AND A CERTAIN BOOK
COPYRIGHTED BY SAID DEFENDANT

This cause came on regularly for trial on the 29th
day of November, 1950, in the court room of the
Honorable Leon R. Yankwich, Judge Presiding;
Schauer, Ryon & McMahon, by Thomas M. Mullen,
appearing as counsel for the Plaintiff, Harwood A.
White, and Leslie F. Kimmell, appearing as counsel
for the Defendant, Susan C. Kimmell, and the
Court having heard testimony and having examined
the proofs offered by the respective parties, and

the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now therefore by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged, Decreed, and Declared as follows:

1. That that certain manuscript, compiled and written by Stewart Edward White, called, referred to and designated as the "Old Gaelic" manuscript is not in the public domain.

2. That that certain manuscript, compiled and written by Stewart Edward White, called, referred to and designated as the "New Gaelic" or "The Job" manuscript was not in the public domain the same was published in book form in the year 1948 under the title "The Job of Living."

3. That the Defendant, Susan C. Kimmell, since October 20, 1944, has been and is now the sole owner of said "Old Gaelic" manuscript and said "New Gaelic" or "The Job" manuscript, and that said Defendant owns the copyright to said book "The Job of Living."

4. That the Plaintiff, Harwood A. White, his agents, servants, and employees be and they and each of them are hereby perpetually enjoined and restrained from using the whole or any part of said "Old Gaelic" manuscript, said "New Gaelic" or "The Job" manuscript, and said book "The Job of Living" in any manner, and from quoting the

whole or any part of said manuscripts and said book.

5. That the Defendant, Susan C. Kimmell, have and recover from the Plaintiff, Harwood A. White, her costs and disbursements incurred herein, taxed at \$58.20.

Dated this 27th day of December, 1950.

/s/ LEON R. YANKWICH,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed December 27, 1950.

Judgment entered December 27, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff, Harwood A. White, hereby appeals to the United States Court of Appeals for the Ninth Circuit Court from the final Judgment made and entered in this action on the 27th day of December, 1950, in Judgment Book Number 70 at page 8 thereof, and from the whole of said Judgment.

Dated: This 22nd day of January, 1951.

SCHAUER, RYON
& McMAHON,

/s/ THOMAS M. MULLEN,

/s/ ROBERT W. McINTYRE,
Attorneys for Plaintiff
Harwood A. White.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 24, 1951.

In the United States District Court, Southern District of California, Central Division

No. 11540-Y-Civil

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND COMPANY, INC., a Corporation; DOE I, DOE II, DOE III, DOE COMPANY, a Corporation, and ROE COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

November 29, 1950

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, By,

THOMAS M. MULLEN, Esq.,

26 East Carrillo Street,

Santa Barbara, California.

For the Defendant, Susan C. Kimmell:

LESLIE F. KIMMELL, Esq.,

215-D Ocean Avenue,

Laguna Beach, California.

Wednesday, November 29, 1950. 10:00 A.M.

The Clerk: No. 11540-Y, Harwood A. White v. Susan C. Kimmell, et al.

Mr. Mullen: Ready for the plaintiff.

Mr. Kimmell: Ready for the defendant Susan C. Kimmell.

The Court: All right, gentlemen. Let me ask, who is appearing for the plaintiff?

Mr. Mullen: Thomas M. Mullen, your Honor.

The Court: Let me ask you one question, before you make an opening statement, Mr. Mullen. You are not claiming an actual violation of the copyright, but you claim sort of a threatened violation, or has the situation changed since the complaint was written?

I may say, frankly, that while I am very familiar with the law of copyright, as you no doubt are aware, by the number of opinions I have written, both as a judge of this court and as a judge of the Superior Court, this is the first time that a declaratory judgment has arisen with regard to copyright material. I want to make certain whether we are deciding a question in advance of an alleged appropriation, or what.

Ordinarily, the violation of a copyright, unless a right of ownership is involved as between certain persons—and I have had actions of that character—unless we are dealing with who owns a copyright, under the federal statute no right [2] of action, either under the common-law right of literary property or under the federal copyright laws, is actually

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

violated until there has been an actual appropriation and use of the material.

Mr. Mullen: With your Honor's permission and perhaps at the expense of a few surplus words here, I think I can probably summarize very briefly for your Honor what we understand——

The Court: The only thing, I have allotted two days for this case, and I want to warn you that it must be finished by tomorrow evening because I am due to hold court in Fresno Friday morning.

Mr. Mullen: I think, your Honor, that we probably will be able to complete well within the time limit.

We are asking for this declaratory judgment, your Honor, upon the following theory: In this case there is really a single clear-cut issue presented. The issue is whether or not a certain manuscript, literary property, was the subject of a general publication or a limited publication by the author.

That becomes of importance in this manner: that certain portions of the material in a manuscript known as "The Gaelic Manuscript" or "Old Gaelic Manuscript" have been incorporated in a book entitled "The Job of Living," which has been copyrighted and published by the defendant in this action.

The plaintiff in this action happens to be the brother of the original author of "The Gaelic Manuscript." [3]

The Court: That is Stewart Edward White, who wrote historical novels?

Mr. Mullen: That is correct. "The Gaelic Manuscript," your Honor, is a compilation of communications received by Stewart Edward White purportedly from an invisible person in the spirit world.

As these various conversations took place, they were recorded day by day or week by week, as they occurred, and accumulated chronologically.

After some 15 years or thereabouts, we think the evidence will show, Stewart Edward White compiled from the chronological accumulation of these spiritual communications this manuscript called "The Job of Living."

It is our position that, after compiling that manuscript, Stewart Edward White freely distributed this manuscript to all persons who manifested an interest in the same. That he permitted several persons to make mimeographed copies of the same and to sell those to any person who applied to him for copies for reading or for purchase.

We contend that, by that action, in himself distributing this "Gaelic Manuscript" and in permitting others to reproduce it and distribute it for sale, he released his common-law copyright privilege in the manuscript. Therefore, at a subsequent date, when he himself quoted in his book, "The Job of Living," from "The Gaelic Manuscript," the book "The Job of [4] Living" quotes from the "Old Gaelic Manuscript," not entirely but in portions.

That copyright on "The Job of Living" was assigned in the year 1944 to the defendant Susan Kimmell, the defendant in this action. Susan Kim-

mell owns, I believe, the copyright to "The Job of Living," and the present issue presented, your Honor, is that Harwood A. White, one of the persons who, prior to the copyrighting of "The Job of Living," was given a copyright of the manuscript, "The Gaelic Manuscript," and told he might do with it what he wished. He now wishes to write a book based upon the "Old Gaelic Manuscript." He has been informed, I believe, by the defendant Susan Kimmell that any attempt on his part to quote from the portions of the "Old Gaelic Manuscript" which appear in the copyrighted book "The Job of Living" would constitute and be an infringement of her copyright privileges.

The Court: As you know, under copyright law, manuscripts may, under certain limited conditions, be copyrighted material.

Mr. Mullen: That is correct, your Honor.

The Court: In fact, I have done it myself. I have copyrighted lectures, when I was on the Extension Division, when I talked all over the State of California. For instance, I copyrighted a lecture I used to give on the defenses on the law of libel, and afterwards I was able to incorporate it in my first book on libel, and then in my second book, which [5] I published this year.

Does the defendant assert here a copyright of the manuscript?

Mr. Mullen: No, your Honor.

The Court: Or priority rights in the manuscript, by reason of transfer of them, or what?

Mr. Mullen: I think the position of the defendant——

The Court: I will have them state it.

Mr. Mullen: It is my understanding of the position of the defendant that they claim a copyright interest only in the portions of "Gaelic Manuscript" which have been quoted in the book "The Job of Living."

Mr. Kimmell: May I interpolate, your Honor?

The Court: Yes.

Mr. Kimmell: And also common-law rights in the unpublished portions of "The Gaelic Manuscript" which do not appear in the book entitled "The Job of Living."

The Court: Just a minute. Let us find out who appears in this case.

Mr. Mullen: At this time, your Honor, plaintiff will move to dismiss as against the defendants E. P. Dutton and Company, Inc., a corporation, and also as against all of the fictitious defendants.

The Court: That is good. That is a condition precedent to trial. The order will be made dismissing as to E. P. [6] Dutton and Company and the fictitious defendants. The case will proceed only against Susan C. Kimmell.

Mr. Mullen: In answer to Mr. Kimmell's point there, your Honor, it is the contention of the plaintiff that any common-law copyright that might apply to "The Gaelic Manuscript" was lost by virtue of the unlimited or general publication of the manuscript by the author, Stewart Edward White, and there is no common-law right of literary property

in the manuscript by virtue of that general publication.

Secondly, by virtue of the general, unlimited publication prior to the year 1944, when Susan Kimmell acquired any right in "The Job of Living," that any formal copyright under the statute would not be applicable to the material in "The Old Gaelic Manuscript," because of its prior abandonment to the public.

The Court: All right. I will hear you, Mr. Kimmell.

Mr. Kimmell: Insofar as Mr. Mullen's statement covers facts, it is substantially correct. I think all I need to say at this stage is that the distribution alleged of the manuscript in question by Stewart Edward White personally and by other people, with his permission, was a limited, qualified distribution. The cases hold that that does not divest the party of any common-law rights.

The Court: As I understand the law of copyright, the circulation of a manuscript in a small group, in itself does [7] not destroy the proprietary right. It is akin to the law of patents, where the making of experimental models, and things like that, do not constitute reduction to practice, which would invalidate the claim of the patent afterwards. It is only when it is done with an intention to dedicate to the public——

Mr. Kimmell: Without discrimination as to persons.

The Court: That is right.

Mr. Kimmell: That is the whole issue in this case, your Honor.

The Court: Let us get the facts in and then we will talk about the law later.

Mr. Mullen: Your Honor, as an aid to brevity, I might call your Honor's attention to probably an issue of law that will arise in this case. It is contained in paragraph IX on page 3 of the answer. They first deny generally any dedication or abandonment to the general public of "The Gaelic Manuscript," and then, commencing on line 8 of page 3, they admit that Stewart Edward White distributed copies of this manuscript and allege, however, only to persons particularly interested in the subject-matter thereof.

Now, also, down in the paragraph commencing at line 14, they admit that Stewart Edward White permitted certain named individuals to reproduce copies of this manuscript by mimeograph and to distribute the same. Then they say, "and in [8] this connection alleges that the said Stewart Edward White instructed them and each of them that copies of said manuscript were to be distributed by them only to persons particularly interested in the subject-matter thereof."

We raise as a matter of law, your Honor, the point as to whether the contention of the defendant that the distribution was to be made only to persons interested is adequate, as a matter of law, to plead a limited publication, for the simple reason that anyone that buys a book is an interested person

and is not a member of a defined or definitely ascertainable class.

The Court: This action, being for declaratory judgment, seeks declaration, unless I dismiss the case on the ground it is not right for declaration, which I have a right to do. It may be a declaration one way or the other. That admission is too general to form the basis of a finding of fact. You would have to find out how many. If you gave it to a hundred people scattered throughout California, that is one thing. If you gave it to ten people in or about his residence, assuming he resided in some definite city in California, that is a different proposition.

It may also be immaterial as to whether the instructions were of such a nature as to have a binding effect upon others. Supposing you give them instructions, and thereafter violate them, and as a result thereof it should develop the manuscript [9] was freely distributed, it then becomes a question of law as to whether, notwithstanding the injunction, in reality there was a general distribution and dedication to the public of the portion of the material which is not published in the other book.

Let us hear all the facts relating to the matter, and then I will discuss with you the law of the matter afterwards.

Mr. Mullen: Plaintiff will call Mr. Harwood White.

HARWOOD WHITE

the plaintiff herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Harwood White.

Direct Examination

By Mr. Mullen:

Q. Mr. White, you are the plaintiff in this action, are you? A. Yes.

Q. Are you related to the former Stewart Edward White? A. Yes. He is my brother.

Q. When did Stewart Edward White become deceased? A. 1946.

Q. Now, are you familiar with the origin and evolution of the so-called "Gaelic Manuscript," which is the subject-matter of this action? [10]

A. Yes, I am.

Q. Now, was "The Gaelic Manuscript" the work of Stewart Edward White during his lifetime?

A. Well, he was supposedly—it was supposedly dictated to him by an invisible, by someone in the spirit world.

Q. Did Stewart Edward White undertake to collect and to compile these alleged communications?

A. Yes. These dictations were always taken down and then were typed, first on Ditto carbon, and

(Testimony of Harwood White.)

then mimeographed on a Ditto machine. A number of people kept complete files in chronological order of these records, through the years.

Q. Now, did you have, personally, occasion to participate in the gathering of portions of the material contained in "The Gaelic Manuscript"?

A. Yes, I would say roughly a third that I took down the dictation in a species of shorthand and later typed and Dittoed the results.

Q. Can you state over what period of time the gathering of the material contained in "The Gaelic Manuscript" took place?

A. It began in 1923 and extended through 1933.

Q. Now, approximately when did Stewart Edward White produce the first copy of "The Gaelic"—or a copy of the manuscript as a manuscript in its present form? A. In the fall of 1933. [11]

Q. Prior to that time, namely, the fall of 1933, did you have occasion to see or observe any of the material contained in "The Gaelic Manuscript" in any other form than their ultimate mimeographed form?

A. Yes. The original records were all sent to me as they came out, and were Dittoed.

Q. When you say "the original records," to what do you have reference?

A. I refer there to the dictation that was taken down and typed and Dittoed. Those are the original records.

Q. Did you ever have occasion to ascertain whether there were other copies of these Dittoed

(Testimony of Harwood White.)

sheets distributed to persons other than yourself?

A. Yes, there were a small group that regularly received these records.

Q. About, approximately, how many, if you know?

A. Oh, I would say perhaps a dozen; might have been a few more, but about that.

Q. Now, were the Ditto sheets which you personally received only those which pertained to material in which you had personally participated in compiling?

A. No, they always sent me complete records of all the various sessions they undertook.

Q. Do you know whether that same state of facts was true as to the other persons who received the same material? [12]

A. No. There were certain ones who received a full assignment of the whole thing.

Q. In addition to yourself?

A. Yes, in addition to myself. And there were some others who came in, in the course of the years, so they didn't get the early records but they got them later.

Q. Have you had occasion to ascertain whether or not "The Gaelic Manuscript" consists in whole or in part of these Dittoed materials sent to you during this 10-year period? A. Only a part.

Q. What is the fact with regard to the contents of "The Gaelic Manuscript"? What does it contain?

A. "The Gaelic Manuscript" contains those dic-

(Testimony of Harwood White.)

tations made only by my brother Stewart, from '23 to '33.

Q. Does all the material in "The Gaelic Manuscript" appear in the Dittoed sheets which were sent to you through those years? A. Yes.

Q. Did you receive materials additionally to those that appear in "The Gaelic Manuscript"?

A. Oh, yes, a great deal more.

Q. Do you know, of your own knowledge, why "The Gaelic Manuscript" does not contain all the materials?

A. Partly because much of the material in the records was dictated through my brother's wife, Betty, and those were [13] not included in "The Gaelic Manuscript" because "Gaelic" appeared only through my brother Stewart.

Q. Is there additional "Gaelic" after the time of the compilation of this manuscript?

A. Yes, he did some more "Gaelic" between '33 and '38.

Q. Does or does not that appear in "The Gaelic Manuscript" that is the subject of this action?

A. No, it doesn't appear in "The Gaelic Manuscript."

Q. At the time that Stewart Edward White, or about the time that he compiled "The Gaelic Manuscript," I think you said about the fall of 1933, did you obtain a copy of the compiled work?

A. Yes, I did.

Q. In what form did you receive it?

A. He sent it to me with a letter, and it was

(Testimony of Harwood White.)

a book, a blue book, paper-bound; not a regular published book, but it was a mimeographed—mimeographed sheets that were bound together in a blue paper binder.

Q. Did you receive any communication of any kind from Stewart Edward White concerning this manuscript at or about the time you got the copy?

A. Yes, I did.

Q. What was the form of that communication?

A. The letter.

Q. Do you now have the letter? [14]

A. No, I don't.

Q. Do you know whether or not such letter is now in existence?

A. I am pretty sure not, because I made no practice of keeping those letters.

Q. Do you have a recollection as to the substance and contents of that letter?

A. Pretty fairly well.

Q. Will you give us the substance of that letter of transmittal that accompanied the manuscript, as best you now recall?

A. Well, he said that he was getting out this preliminary presentation of some of the "Gaelic" material, because he had found there were so many people interested in it and desirous of reading it, that he wanted to make it available.

He suggested that I read it through and then show it to as many people as wanted to read it or that I thought would care to read it.

(Testimony of Harwood White.)

Q. Was this letter signed by Stewart Edward White? A. Yes.

Q. You are familiar with the signature of your brother? A. Oh, yes.

Q. Did you, in fact, circulate the manuscript pursuant to such letter?

A. To a certain extent, yes, I did. [15]

Q. Approximately how many people did you hand the manuscript to, as you best now recall?

A. I think not more than half a dozen, because I circulated the records more than I did the manuscript, the original records.

Q. The original records from which the manuscript was compiled? A. Yes.

Q. Subsequent to your receipt of a copy of the manuscript and the letter concerning which you have given testimony, did you have occasion to thereafter have any conversations with your brother, Stewart Edward White, concerning the manuscript?

A. Yes.

Q. Can you tell us when the first conversation that you recall ever took place?

A. Well, it would have been a matter of a few weeks after I received the manuscript that he came to Santa Barbara and stayed at our house.

Q. Where did the conversation take place?

A. He stayed at our house and we talked there.

Q. The conversation you are now referring to, do you recall who was present?

A. No, I don't. Probably Betty was there and maybe possibly—probably my wife. [16]

(Testimony of Harwood White.)

Q. Now, what was the general substance of that conversation, as you best recall?

A. Well, I——

Mr. Kimmell: Your Honor, I think he ought to use the language exactly as he can recall it.

The Court: If he can.

Q. (By Mr. Mullen): Do you recall precisely what was said at that conversation?

A. I can't recall the language.

Q. Do you recall the substance of the conversation? A. Yes, quite clearly.

Q. Will you give us the substance of that conversation, to the best of your recollection?

A. Well, I asked him, since so many people appeared to be interested in this, why he didn't make a book of it and publish it, the way he had the other books, through Dutton and Company.

He said that he felt that Betty's work should hold the center of the stage and was more important, and he had a number of other books he wanted to get out of hers, that he had in mind. That, therefore, he didn't want to inject himself. He was always very reticent about his own work. He thought hers was more important.

He didn't want to inject himself into the picture. That was the reason he put it out in this informal manner, so that [17] as many people as possible would have an opportunity to read it, without actually putting themselves before the general public in a book.

Q. Now, did you have any subsequent conversa-

(Testimony of Harwood White.)

tions with Stewart Edward White concerning this manuscript?

A. Yes. A matter of a year or two later I tried to get another copy of it.

Q. If I may ask you, Mr. White, where did the next conversation, to which you are now alluding, take place?

A. That was in Burlingame.

Q. You say it was about a year after the first conversation?

A. It was within a year or two; it was not very long afterwards.

Q. Who was present, if you now recall?

A. I don't recall that.

Q. All right. Do you remember exactly what was said at the conversation to which you now have reference?

A. No, I can't remember the exact language. Again, I can remember what the substance was.

Q. Will you give us the substance of that next conversation, as you best now recall?

A. A friend of mine wanted a copy of this "Gaelic" because he wanted to be a distributing station for it. Stewart had been interested in having various people all over [18] the United States act as distributing stations for this manuscript, to circulate it among the people.

This particular individual, W. B. Conrad, was very anxious to get a copy, to circulate it among his friends.

I asked Stewart if he could let me have an extra copy for Bill Conrad.

(Testimony of Harwood White.)

He said no, he was sorry he couldn't, because he had sent all his manuscripts out into circulation, lending them around, and that the people had liked it so much that they had all kept them and never sent them back. He just didn't have any more.

Q. Did Stewart Edward White ever make any statement to you as to his reason for his desire to circulate these manuscripts? A. His idea——

Q. Tell us if he made any statement with regard to his intentions in the matter.

The Court: Answer that question yes or no. Then your attorney will ask you to fix a time, approximately.

The Witness: All right. Let me see, I want to be accurate about it. Yes, he did.

Q. (By Mr. Mullen): All right. Approximately when and under what circumstances did he make such statement or reference?

A. Well, in the first conversation I had with him, when [19] he came down to Santa Barbara——

Q. What, if anything, did he say with reference to his reasons for wanting to circulate?

A. Well, he was interested in supplying a demand for this philosophy. He felt the philosophy was very important, and a lot of people wanted it, and he wanted to see they got it.

Q. I take it, Mr. White, that "The Job of Living" is a philosophy of one's life, is that a correct statement?

A. It is roughly in two categories. The "Gaelic" part of it is on the technique of living, that has

(Testimony of Harwood White.)

been published already in a book called "The Job of Living."

There is another entire category, which you might call cosmology or general philosophy of the universe, or life in general, what the world is about, or what the universe is all about. "Cosmology" is about as good as you can get. That, he figured, should be published in another book at some time.

Q. Was Stewart Edward White interested in this matter of philosophy?

A. Yes, he made it his life work.

Q. Do you know whether he undertook to disseminate this philosophy to others?

A. He devoted his entire time to it, after his wife died.

The Court: Did he believe in what is commonly called [20] spiritualism, or what is popularly called that?

The Witness: That is one of those terms that has a lot of bad connotations to it.

The Court: I know it has.

The Witness: He didn't believe in spiritualism, in the seance system.

The Court: He believed in what the scientists call spiritism, the power of people to communicate through others, like Eileen Garrett, who edits the magazine called Tomorrow, is not that correct? She has written books indicating that some of the material was communicated to her by spirits living long ago, and communicated through her.

(Testimony of Harwood White.)

The Witness: Yes. Stewart's attitude was very interesting. To begin with, he was a complete skeptic and very much against it. Through the weight of evidence he was finally—of his wife's work—he was finally won over to, as he put it, that he was too much of a skeptic not to believe, because so many things came up. The explanations got harder to believe than the survival idea, you see.

Q. (By Mr. Mullen): Mr. White, at any time whatsoever did Stewart Edward White orally or in writing give you any instructions or make any statement to you concerning to whom you might distribute or circulate "The Gaelic Manuscript"?

A. No, he made no limitation of any kind.

Mr. Kimmell: I don't think that answer is responsive to [21] the question, your Honor.

The Court: Read the question and answer.

(The record was read.)

The Court: That is correct. Did he say to distribute it to only certain types of people interested in philosophy, or not?

Q. (By Mr. Mullen): Did he make any statement to you that you might distribute it to any person you pleased?

Mr. Mullen: I might strike that and ask this question: I will ask you whether or not the letter of transmittal, concerning which you have given testimony, which was given to you, made any statement concerning the matter of circulation or distribution of the manuscript?

A. Yes, it did.

(Testimony of Harwood White.)

Q. What did the letter state in regard to the matter of circulation?

A. I can't remember the exact words, but the gist of it was that I was to show it to as many people as wanted to look at it.

Q. At the time of Stewart Edward White's death, did you have occasion to examine his books and manuscripts to determine the kind and number in his possession?

A. Yes, I did.

Q. How many copies of "The Gaelic Manuscript" did Stewart Edward White have at the time of his death? [22]

A. Two.

Q. I beg your pardon?

A. Two.

Q. During Stewart Edward White's lifetime did he write a number of books?

A. Yes, he did.

Q. Approximately how many?

A. Sixty-odd.

Q. Did he have these books copyrighted and printed and circulated through commercial channels?

A. Yes.

Mr. Mullen: I think that is all.

Cross-Examination

By Mr. Kimmell:

Q. Mr. White, you mentioned a while ago distributing stations. Will you explain what that term meant, in the connection in which you used it or you said your brother used it?

A. Well, Stewart had a number of very close

(Testimony of Harwood White.)

friends throughout the country, in two categories. In the first category he had a group of close friends throughout the United States who were interested in this work. And he also sent his records and he also sent this manuscript to these special people, with the idea that they would use these manuscripts to show to other people who might be interested; among their friends, in other words. And they could act as a sort of [23] circulating library for the distributing. That was the general idea.

Then later on he abandoned any idea of certain special ones and sent these "Gaelic Manuscripts" out to a very wide group of people, some of whom he didn't know at all, hadn't previously known, but who simply wrote him and asked him if they could have copies.

He sent this manuscript out to them, with the understanding and with the instruction that they would use it to show to other people.

He said, "My interest in sending you this book is not only that you should have it, but that you should show it to your friends." I heard him say that repeatedly.

Q. Why did he want the manuscript shown to other people, as you allege? Was it merely for the sake that they might see this thing which he had produced, or was it for the purpose of acquainting them with the theories of philosophy and metaphysics involved, and the teachings contained therein?

(Testimony of Harwood White.)

In other words, was the purpose to distribute the manuscript or disseminate the theories and the philosophies which constitute the subject of the manuscript?

Mr. Mullen: Excuse me, Mr. Kimmell. You are asking him now whether Stewart Edward White made any statement concerning his purpose?

The Court: That is right. [24]

Mr. Kimmell: Yes, that is right.

The Witness: I don't believe he ever made any distinction of that kind to me. He just said he wanted it circulated widely and—well, the only thing I can say is that he over and again said he didn't want people to get a copy and just put it away and leave it. He wanted people to have it that would show it to others.

The Court: That showed an interest in his idea?

The Witness: Yes.

The Court: In other words, he was interested in people who might be interested in the same ideas as he had?

The Witness: He felt that this work was more important than anything he had done, and that it ought to be widely disseminated, as widely as possible.

The Court: All of us have pet ideas and spread them among people that might be interested in the thoughts we express.

The Witness: It is something like that.

The Court: If that were not so, some of us

(Testimony of Harwood White.)

would not devote \$1,000.00 worth of time to give a speech for which we do not even get paid.

Q. (By Mr. Kimmell): Mr. Witness, is it not a fact that in each instance where he placed a manuscript in the hands of somebody else it was a loan or a gift?

A. Loan or a gift? Yes, he never sold it. [25]

Q. He never sold it? A. No.

Q. Never received any money for any of these manuscripts?

A. Stewart didn't—no, to my knowledge. I never heard him say he received anything. I was never aware of any given instance where he did.

The Court: You did not receive any money?

The Witness: No.

Q. (By Mr. Kimmell): Mr. White, do you know of any instance where Stewart Edward White placed a copy of this manuscript in a public library in California or anywhere else? A. No.

Q. Do you know of an instance where a copy of this manuscript, a copy or copies of this manuscript, appeared on the shelves of a retail bookseller or sellers in California or anywhere else?

A. No, I don't.

The Court: This Ditto process, is that a multi-graph system?

The Witness: Ditto?

The Court: What are you talking about? I have known various methods of reproduction, multi-graphing and duplicating. This is the first time I have heard of this Dittoing.

(Testimony of Harwood White.)

The Witness: It is a sort of a purple carbon paper that [26] you type onto a paper with, and you lay that down on a sheet of gelatin and the typing comes off.

The Court: It is old-fashioned mimeographing?

The Witness: Yes.

Mr. Mullen: I believe the technical term is hectographing.

The Court: It is called that now?

Mr. Mullen: Isn't that correct, Mr. White?

Mrs. Kimmell: Yes.

The Court: There are manuscripts being published that way. I know of a small weekly newspaper in San Diego County that a friend of ours produces in that manner. It is called the Democrat. I happen to know the woman that does it. It is four sheets and it contains editorial comments on current events. It is produced that way and distributed, 500 or 600 copies.

Mr. Kimmell: Your Honor, would you be interested in examining the original hecto? We have it in court here.

The Court: I wanted to know what the process was. How many would you produce in that fashion?

The Witness: The original records were produced by this hectographing method, and I would say perhaps 15 copies were made of those. The manuscripts, subject of this suit, were not made by that method; stencils were cut.

The Court: You can run thousands of copies

(Testimony of Harwood White.)

on that, [27] until it begins to blur, and then you can make a new copy.

The Witness: That is correct.

The Court: I did not know whether that system produced a hundred copies, or what.

The Witness: I found out it produced 15.

Q. (By Mr. Kimmell): Mr. White, do you know of any instance where copy or copies of this manuscript were in a lending library of California, or anywhere else? A. No, I don't.

Q. Your brother, at the time he distributed these copies, was not in the retail book-selling business or running a lending library, was he, for hire?

A. Not for hire, but he always spoke of his "Gaelic Manuscripts," these manuscripts, as his lending library.

Q. I refer to regularly established commercial lending libraries.

A. No, he didn't. He never took money or pay for it.

Mr. Kimmell: That is all, your Honor.

The Court: Is there any redirect examination?

Mr. Mullen: I think not.

The Court: Mr. White, I want to ask one question. Can you tell me the number of persons, the largest number of persons or smallest number of persons, or a number between the largest and smallest, to which any portion of this manuscript was distributed by you? [28]

The Witness: By myself?

The Court: Yes.

(Testimony of Harwood White.)

The Witness: I would say it would be between 30 and 50.

The Court: Each time?

The Witness: Well, I mean—I showed the manuscript——

The Court: As a whole. We are talking about manuscripts. I understand this came out in portions.

The Witness: Yes.

The Court: Well, are you talking about distribution of all the portions put together, or individually, as they came out?

The Witness: Both.

The Court: Both?

The Witness: Yes.

The Court: About 30 persons?

The Witness: 30 to 50.

The Court: Who selected the names?

The Witness: I did.

The Court: You did?

The Witness: Yes. Nobody ever——

The Court: Were they persons of a certain type? What was the type of person? Were they persons whom you knew, or did he have, as all of us who write have, a private mailing list and would turn it over to the secretary and say, "Send these to my usual mailing list," or what? [29]

The Witness: No, there was no private mailing list. Some were people I knew well and others were people I knew slightly. And other people came to me, even from out of town, that heard about it.

The Court: The group was a limited group, chosen by you?

(Testimony of Harwood White.)

The Witness: It was chosen by—I mean, just anybody that happened to come to me that was interested. I never refused it to anybody.

The Court: There were two classes: people whom you chose because you thought they would be interested——

The Witness: Yes.

The Court: ——and people that had heard about it and came to you and asked you?

The Witness: Yes.

The Court: Those groups covered 30 to 50 persons to whom you distributed?

The Witness: Yes.

Mr. Kimmell: May I ask one more question?

The Court: Yes.

Q. (By Mr. Kimmell): You stated you let anyone see it who came to you? Was there anyone who was not particularly interested in the subject-matter in the manuscript—would they be apt to come to you?

Mr. Mullen: That is an argumentative question. [30]

The Court: This is cross-examination. Mr. White may answer, if he can.

The Witness: I can't imagine anybody would ask to see something they weren't interested in, regardless of what it was.

Mr. Kimmell: That is all.

The Court: Step down.

(Witness excused.)

Mr. Mullen: Come forward and be sworn, please, Mrs. Maguire.

W. N. MAGUIRE

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: W. N. Maguire.

Direct Examination

By Mr. Mullen:

Q. Now, Mrs. Maguire, were you acquainted with Stewart Edward White during his lifetime?

A. Yes, sir.

Q. In what capacity did you know him and over what period of time?

A. As his secretary, from the early spring of 1919 or 1920 until the time of his death.

Q. When did his death occur? [31]

A. In '46, the fall, September, I think.

Q. Did you have occasion to serve him as his secretary then during the period from 1919 to 1946?

A. Yes, I did.

Q. Now, are you familiar, Mrs. Maguire, with the mimeographed manuscript which we have referred to as "The Gaelic" or "Old Gaelic Manuscript"?

A. Yes, I am.

Q. Will you state the conditions under which you first became familiar with "The Old Gaelic Manuscript"?

A. I knew that Mr. White was working on it,

(Testimony of W. N. Maguire.)

because of occasional mention, but I heard of it definitely and saw it for the first time when he brought it to my house and asked me to make a figure.

He paid me, not per month, but by the work I did for him. He asked me to give him a figure on making a certain stated number of mimeographed copies of it, because he wished to distribute more than his hectograph copies had allowed him to do.

Q. When you say you first saw it, in what form was the material at the time that you saw it?

A. The material was in what we call his original Ditto copy.

Q. Is the word "Ditto," as you used it there, synonymous with the word "hectograph"? [32]

A. Yes, but his hectograph was a Ditto machine. It was named that, so we always called it that.

Q. It was the gelatin process of running sheets off of indelible ink imprinted on there?

A. The typing was done with an indelible ribbon, a purple ribbon, on your typewriter. You had to be careful not to touch the page. This page was turned on the gelatin substance, and the prints were made.

Q. Those that were brought to you were the ones concerning which you are giving testimony?

A. Yes.

Q. What, if anything, did you say with regard to Mr. White's inquiry as to the cost of mimeographing?

A. I told him how much, approximately, it would

(Testimony of W. N. Maguire.)

cost, and he said to go ahead and make him 60 or 70 copies of it.

Q. Did you, upon receiving that instruction, make mimeographed copies?

A. I proceeded at once to cut the stencils and secure the proper paper, which could be printed on both sides, and made the copies he asked for.

Q. Do you know exactly how many copies were made, or can you give just your best estimate?

A. As I recollect, he wished to have 60 or 70, and I think that is what I produced.

Q. Somewhere in that general vicinity? [33]

A. In that neighborhood, yes.

Q. Did you have these copies covered or bound in any fashion?

A. I had them bound in the local newspaper shop. I had no press facilities.

Q. I show you at this time, Mrs. Maguire, a mimeographed manuscript which has a light blue cover on the front and back, and a dark blue binding, and I ask you if you recognize what this object which I now hand you purports to be.

A. Yes, this is one of the first issues or first printings that we made of "The Gaelic Manuscript."

Mr. Mullen: Do you wish to examine this, Mr. Kimmell?

Mr. Kimmell: Yes.

Mr. Mullen: We would like to offer this as plaintiff's first exhibit in order, and ask it be received and marked.

The Clerk: Is this admitted, your Honor?

(Testimony of W. N. Maguire.)

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 1 and received in evidence.)

Q. (By Mr. Mullen): Now, what happened or what was done with the copies of Plaintiff's Exhibit No. 1 upon the completion of the binding, if anything, Mrs. Maguire?

A. They were delivered back to my office, at which time I called Mr. White's home and told him they were ready. [34]

Q. Following that call, did or did not Mr. White come to your office?

A. He came to the office, either that day or the next morning; I don't recollect now. He had a list of names to whom some of them were to be sent, and a record containing the dictation of the letter he wished to go with them.

Q. When you say "a record containing the dictation," what do you mean by the term "record"?

A. Mr. White dictated all his correspondence on the records of an Ediphone. I had the transcriber in my office, and he brought the records to me for transcription.

With the records he always handed me either the letters that were to be answered or the list of names and addresses to whom the letters he had dictated were to be addressed, so that he saved space on his records.

(Testimony of W. N. Maguire.)

Q. On this occasion you say he handed you a list of names? A. That is right.

Q. And a letter dictated on a record?

A. That is right.

Q. What is the fact with regard, or, did he ask you to write any letters at that time?

A. He asked me to write these letters and get them ready as quickly as possible, because he was anxious to send them out. [35]

Q. How many persons did he request that letters be prepared to?

A. As near as I recall at the time, remembering the stack of books on my desk, I think we had 18 or 20 books to send out, and letters to go with them, at that first writing.

Q. Did he dictate the same or a different letter to go to these 18, or thereabouts, recipients of the manuscript?

A. Both. The first paragraph was to go to all of them, and then the personalities or any other news he wished to give the recipient, or information, was added to each one, name by name.

Q. Now, did you have occasion then, pursuant to his handing you the record and the list of names, to prepare letters to some 18 persons, or thereabouts, to accompany the mailing of these books?

A. Yes, I did.

Q. Upon completion of the transcribing of these letters, Mrs. Maguire, did you tender them to Mr. White for signature?

A. He picked them up the next day.

(Testimony of W. N. Maguire.)

Q. Were the manuscripts and the letters written by you then dispatched to the persons to whom addressed? A. Yes, they were.

Q. Do you have a copy at this time of the letter or letters written to these 18, or thereabouts, persons, under the circumstances you have just described? [36] A. No, I do not.

Q. Do you know whether or not at this time any copy of that original letter exists?

A. I am sure it does not.

Q. Do you have a recollection of the contents of the transmittal letter? I believe you said it was standard as to part and—— A. That is true.

Q. With regard to the portion that was standard to all of these letters, do you have a recollection as to the contents of the letter?

A. A general recollection, yes, partly because of writing it over and over, and partly because the wording it contained was the policy concerning this manuscript throughout all the following years.

Q. Do I understand he asked you to write this same letter on other occasions?

A. Yes. More books were sent out on later dates, one or two at a time, or three or four at a time, as he secured names to whom he wished the books to go.

Q. Did he make any statement to you as to whether or not you were to preserve this same letter for future use?

(Testimony of W. N. Maguire.)

A. Yes. He asked me on the occasion of giving me the first records, when the larger number was sent out, to be sure and save a carbon, because he would be saying the same first [37] paragraph when he sent out books in the future.

Q. Will you tell us now, as you best recall, the substance of that transmittal letter that accompanied the mailing of the manuscripts?

A. The general verbiage was to the effect that "I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise, you are at liberty to keep it."

Q. Do I understand that after the initial mailing, a day or two after the Plaintiff's Exhibit 1, or the group of some copies that were produced concurrently with Plaintiff's Exhibit 1 were mailed, you from time to time thereafter mailed out other copies?

A. Yes, I did.

Q. Did you on each occasion send substantially the same letter of transmittal?

A. As near as I can recall, we always did.

Q. On any of the occasions of mailings, did Mr. Stewart Edward White make any statement to the persons to whom such manuscripts were being mailed, as to whom they might allow to read the manuscripts? [38]

A. No, he did not.

(Testimony of W. N. Maguire.)

Q. Did he ever make any statement limiting their use or distribution of the manuscripts, to your knowledge or recollection?

A. No, he did not.

Q. Out of the original run of copies, how long did he have those, if you know?

A. It could have been a year or a little more, I should think, as I recall.

Q. What became of the other copies that were not sent through the mail?

A. He took the larger quantity that was left over to his own house, to distribute to callers who came or to people he happened to meet. He left several with me, which I myself distributed.

Q. How many people did you distribute the manuscript to?

A. I think four or five copies.

Q. Were these all persons who were known to or friends of Stewart Edward White?

A. Well——

Q. Or friends of yours?

A. They were either friends or clients of mine. They were people that had occasion to come to my office and knew I was Mr. White's secretary, and who were interested in the sort of work he was doing at the time. [39]

Q. Were some of those people, who were known to you, unknown to Mr. White?

A. Personally, yes, they were unknown to him.

Q. Were they members of any particular group or association?

(Testimony of W. N. Maguire.)

A. No. There was no group.

Q. At the time Mr. White gave you copies of the manuscript to keep in your office, or at any other time, did he ever tell you to whom you might distribute these manuscripts?

A. He never did.

Q. Now, did you ever have a conversation with Mr. Stewart Edward White concerning the original run of copies, as to how long they lasted or what he did with them?

A. At the time he had used them all up, yes, he came down and said, "Have you any left you kept here? I am all out. What are we going to do?"

I told him no, I had used up my extras, I only had the one he had given to me for myself.

And he said, "Well, I need more."

So I told him I had, as we had planned in the first place, saved the stencils and would make a re-run for him, which I did.

Q. On the second run, how many copies did you make, if you know?

A. Well, I don't have a definite recollection, but I [40] assume, because it would have been impractical to make any less, I made at least 50.

Mr. Kimmell: Could I have that answer read?

(The answer was read.)

Mr. Kimmell: I want to point out, your Honor, that the assumption should be taken with reservations.

The Court: That is all right. That is a question of weight to be given. I will take care of that.

(Testimony of W. N. Maguire.)

Q. (By Mr. Mullen): Will you give us your best recollection, Mrs. Maguire, if you have a recollection, as to the number of copies run?

A. I think it was 40 or 50.

Q. Now, I show you at this time another manuscript, which this time has a single blue cover running all the way around, and mimeographed sheets, and I will ask you to examine this object.

A. This is one of the second run that we made in our office.

Q. You recognize that as being one of the second run of documents or manuscripts?

A. I recognize it as such.

Mr. Mullen: We will offer this as plaintiff's second exhibit in order and ask it be received and so marked.

The Court: All right.

The Clerk: Plaintiff's Exhibit 2 in [41] evidence.

(The document referred to was marked Plaintiff's Exhibit No. 2 and received in evidence.)

Q. (By Mr. Mullen): Now, then, Mrs. Maguire, what was done, if you know, with the copies of the second run of "The Gaelic Manuscript"?

A. In toto, the same as with the first. He took the most of them home. There was not at that time, because a number had been distributed before, there was not at that time a large mailing. As nearly as I can recollect, he took them all home.

Q. From time to time, after the run of the sec-

(Testimony of W. N. Maguire.)

Q. And group of manuscripts, did you have occasion to write letters of transmittal and to mail copies of the manuscript to various and sundry persons?

A. I did.

Q. Can you state whether or not the persons to whom you mailed the copies of the second manuscripts were persons known in toto to Mr. Stewart Edward White?

A. Not all of them, personally. Many of them were people who had written to him and he had no personal acquaintance with them at all. They might have written because—the contents of their letter, which I always saw, would show they had written to him because of acquaintance with some friends who had the book, or having read some of his other books, and knowing of his work. [42]

Q. You are basing your answer on contents of communications you personally saw?

A. I am.

Q. And as to statements by Mr. Stewart Edward White?

A. Yes.

Q. With regard to these letters of transmittal written to persons not known to Mr. Stewart Edward White, did he at any time in his correspondence accompanying these mailings place any limitations on the use they might make of the manuscript or the persons to whom they might hand it?

A. He did not, no.

Q. What did he say, if anything, with regard to the right of distribution?

A. Generally, the same thing as he said in his

(Testimony of W. N. Maguire.)

first letter that he had dictated, that they were perfectly at liberty to show it to anyone that was interested in the contents.

Q. Can you give us an approximation, Mrs. Maguire, of approximately how many people over a period of time you mailed these manuscripts to, in various parts of the country?

A. Including those I mailed from the first printing and second printing, it would probably total between 45 and 55, I should say.

Q. It would be your best recollection that you dispatched, then, some 45 to 55 copies at various times? [43]

A. Yes.

Q. Were those to all parts of the United States or to some particular place?

A. They were to all parts of the United States.

Q. Can you give us any approximation as to how many of those copies and mailings were to persons unknown to Stewart Edward White, who had simply written to him asking him for one?

A. That would be very difficult, because it has been such a long time. I should say possibly at least a third or maybe a little more, where people who had merely written, who had no personal acquaintance with Mr. White.

Mr. Mullen: May we have the deposition of Mrs. Oettinger opened?

The Court: It is attached to the——

The Clerk: It is present here, your Honor, in a separate envelope.

The Court: What is this, one deposition of——

(Testimony of W. N. Maguire.)

Mr. Mullen: No, your Honor. The deposition of Mrs. Oettinger.

The Court: We will take a short recess while you get the deposition.

(Short recess taken.)

Q. (By Mr. Mullen): Now, at this time, Mrs. Maguire, I show you a photostatic copy of a letter which is marked [44] "Plaintiff's Exhibit 1 for identification," and which has accompanied the deposition of Mrs. Oettinger, and I will ask you whether or not you recognize the document which I now hand you. A. Yes, I do.

Q. Will you state what it is?

A. It is a letter dictated by Mr. White to Mrs. Frank Oettinger, in Portland, Oregon.

Q. Is this a true photostatic copy of an original letter prepared by you? A. It is.

Q. I call your attention to the reverse side of this photostat, to a signature, and ask you if you know whose signature that is. A. Yes.

Q. Whose signature is that?

A. It is the signature of Stewart Edward White.

Q. You have seen that signature many times?

A. Yes.

Q. This purports correctly to portray transcribed by you from dictation by Mr. Stewart Edward White? A. That is right.

Q. I direct your attention to the second page or reverse side of this photostat, to a portion, a paragraph that reads as follows: [45]

(Testimony of W. N. Maguire.)

“As to the Gaelic, Sue Kimmell is quite right in saying that you may go ahead at your discretion with more copies of it. And your friend, Barbara Delkin, got the wrong impression. I have no objection whatever to the distribution of copies of Gaelic, provided, of course, it is not in published form.”

This symbol here, these letters, what are they?

A. That is my stenographic symbol (indicating).

Q. Did Mr. Stewart Edward White dictate that to you? A. He did.

Q. You correctly transcribed his dictation?

A. That is right.

Mr. Mullen: I offer that in evidence.

The Court: It may be received.

The Clerk: That is Plaintiff's Exhibit 3 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 3 and received in evidence.)

Q. (By Mr. Mullen): In your capacity as Mr. White's secretary, did you handle any other correspondence between Mrs. Oettinger and Stewart Edward White?

A. Yes, a number of letters before this one was written, when she was a resident of Palo Alto, California.

Q. Do you at this time, Mrs. Maguire, have copies of the correspondence that was received and

(Testimony of W. N. Maguire.)

written by Stewart Edward White with Mrs. Oettinger? [46] A. No, sir, I do not.

Q. Do you know whether or not at this time such copies are in existence?

A. I think probably not.

Q. Can you recall generally the substance or purpose of the correspondence?

A. Yes. I remember that the first letter I saw from her and that the first letter I was asked to transcribe in reply to it, was one she wrote Mr. White saying she had just been allowed to read a copy of "Gaelic" by a Mrs. Katherine Benner in San Mateo, and it had fascinated her so much and interested her so intensely she would like to have other copies and was that possible.

Mr. White replied in a very short letter he had no more copies, he was sorry, but she might, with Mrs. Benner, when Mrs. Benner was through with it, she might make whatever use she could of this one copy.

As I recollect, she replied almost at once that since she was so deeply interested she would like more than one copy and would it be possible, would he allow her to make some mimeographed copies for herself.

Q. What was Stewart Edward White's reply, if any, to that request?

A. He replied she was at liberty to do so, he would be glad to have her do it if she wished. [47]

Q. In any of the correspondence between Mrs. Oettinger and Mr. White, prepared or written by

(Testimony of W. N. Maguire.)

you pursuant to his dictation, did he at any time place upon her any limitation or restriction as to whom she might circulate these copies that were to be made by her?

A. No limitation in any correspondence——

Mr. Kimmel: Your Honor, I think, instead of using those general terms, “restrictions” or “limitations”——

The Court: This witness was his secretary. They are dealing with letters which, if they existed at all, must be in your possession, because they are letters alleged to have been written to your client, so if anyone has them your client has them. If she does not have them, then the best they can do is resort to memory.

Mr. Kimmell: The only point I wanted to raise is that I am not trying to be picayunish or delay this thing, but to avoid the statement of conclusions as far as possible.

The Court: He wanted to find out the contents of these letters. The generalities are necessary when we are dealing with contents of letters.

Now, we have one letter which tells us or gives us the limitation, because he said to copy them or distribute them, but they were not for publication, so there we have a limitation.

You could not modify that, you could not ask for any [48] greater modification nor for anything to explain that. But as to letters which are not before the court, they have a right to inquire di-

(Testimony of W. N. Maguire.)

rectly or indirectly as to what they contain. You may answer.

Mr. Mullen: If I might correct that. I believe you referred to or perhaps assumed that the letters now under discussion were to the defendant in this case.

The Court: No.

Mr. Mullen: We are referring to a Mrs. Oettinger, a third person, not a party to this lawsuit.

The Court: I beg your pardon. I was in error.

Mr. Mullen: Mrs. Oettinger is a third person whom we allege in our complaint was one of several persons permitted to reproduce and distribute copies.

The Court: That is all right. That is the person whose deposition you had taken?

Mr. Mullen: Yes, your Honor.

The Court: It is my error. The argument is valid, so far as the letters are concerned, as they are not before the court. Go ahead.

Q. (By Mr. Mullen): In any of the correspondence between Stewart Edward White and Mrs. Oettinger, did he make any statement to Mrs. Oettinger as to whom she might or might not distribute the copies which she would reproduce?

A. No, he did not. [49]

Q. Did you ever have occasion to handle or to process any communications or letters between Mrs. Oettinger and Mr. White relative to Mrs. Oettinger charging a price for the copies which she would reproduce?

A. Yes, I did.

(Testimony of W. N. Maguire.)

Q. Will you give us the substance of that series of letters, or letter, whatever the case may be, as you best now recall?

A. Some months after her first inquiry as to whether or not she might be allowed to make stencils—that was an interval in which she completed them—she wrote another letter telling Mr. White she had finished the work, but she had not been able because of lack of time to cut the stencils herself. She had had to hire some of them done, and buy paper, and so forth, and would he mind if she made a nominal charge to cover the costs she had incurred?

Naturally, she couldn't afford it all herself. I remember that we discussed that particular letter before he dictated his reply, because he wanted an idea from her as to what each copy might cost, and we went over the original costs that I charged him some several years before, for the work that had been done.

He replied to Mrs. Oettinger in general that it would be all right. I forget his exact wording. That she should let him know. He particularly asked that she let him know what [50] the costs were and what she proposed to charge per copy to those she handed the book to.

Q. Did you ascertain subsequently the charges made by Mrs. Oettinger?

A. If I did I don't recall what they were.

Q. You do recall, do you, a conversation, or.

(Testimony of W. N. Maguire.)

rather, communication from Stewart Edward White authorizing Mrs. Oettinger to make a charge in connection therewith?

A. I do recall that letter, definitely.

The Court: Did you ever have any report from her giving you the details as to how many persons she gave copies to or what she charged?

The Witness: I do recall, your Honor, she sent occasional letters to Mr. White, giving him exactly that kind of report. It has been a great many years since then. I don't recall how many copies or how much money she might have taken in.

The Court: Did the letters contain the names of persons to whom the manuscript had been given?

The Witness: Oh, no, they did not. I know in the letters I saw no list of names and addresses that were ever given him.

Q. (My Mr. Mullen): Now, Mrs. Maguire, at the time of Mr. Stewart Edward White's death, did you have occasion to examine his library of books and manuscripts and determine the [51] number of copies of "Gaelic Manuscript" remaining in his possession at that time?

A. Yes, I did. I was gathering these things up all the time——

Q. How many copies?

A. ——and getting them in order.

Q. Excuse me. How many copies of "Gaelic" did Mr. White himself retain as of the time of his death?

A. Of course, he had the one or two, what we

(Testimony of W. N. Maguire.)

called original "Ditto" records, that were never let out of his possession. One was what he called a library copy and the other was a work copy, because he could make marginal notes.

There were several copies of these mimeographed ones, one or two or three, perhaps.

Q. Did you have occasion as his secretary, from time to time, to see mimeographed copies of this "Gaelic Manuscript" that had been produced by other persons, other than yourself?

A. Yes, I have, on occasion.

Q. On how many occasions have you seen manuscripts, copies of "The Gaelic Manuscript" made by others than yourself?

A. I have several times seen a copy of one that Mrs. Oettinger made in Mr. Harwood White's possession. And I recall probably one of Mrs. Oettinger's copies, it must have been, because it had a brown cover on it, as I recall, in Mr. Stewart Edward White's office. [52]

Q. Did you ever seen a copy prepared by a Mrs. Duce of New York?

A. I don't recall that I did.

Q. Do you know, by reason of any contact with correspondence, whether other persons than yourself and Mrs. Oettinger did make copies of this manuscript?

A. Yes, I know that a Mrs. Duce did make some copies.

Mr. Mullen: I think that is all.

(Testimony of W. N. Maguire.)

Cross-Examination

By Mr. Kimmell:

Q. Mrs. Maguire, you stated that you were Mr. White's secretary. Isn't it a fact that the chief secretarial duties which you performed——

The Court: Raise your voice, Mr. Kimmell, please. You drop your voice.

Q. (By Mr. Kimmell): Isn't it a fact that the chief secretarial duties you performed for Mr. White was making copies or typing copies of letters and manuscripts from Ediphone records prepared by him in his own study, in your absence?

A. Yes, I was. During those early years of my secretaryship I was never present in his own office. I had my own office down in the Village.

Q. Wasn't that about the arrangement all through your relationship with Mr. White? [53]

A. My duties were to do whatever he asked me to do, Mr. Kimmell. They included——

Q. They——

Mr. Mullen: Let her finish, please, Mr. Kimmell.

Mr. Kimmell: I am sorry.

The Witness: They included, first of all and principally, the typing of the manuscript he had written mostly by hand, one, usually one book each year.

They included from three to a dozen records each week, dictated in his office to an Ediphone and brought to me to be transcribed into original and

(Testimony of W. N. Maguire.)

copies, if he asked for them, of letters to be written to his correspondents.

Then it included the compilation of his monthly bills, the writing of all checks in payment of them. During his absence, in his long summer vacations, the signing of those checks or seeing that the bank issued bank checks for them.

Looking after, in general, his home, his servants and his estate, when he was away. During two long trips that he was away in Africa, and every summer in Alaska for 17 years.

Q. (By Mr. Kimmell): But generally the transcription work you did was done in your office from Ediphone records prepared by him?

A. It was, with the exception, for the last three years of my association with him, at which time I lived at his home and did a great deal in his office or in my own rooms in his [54] home.

The Court: Are you a stenographer or just a typist?

The Witness: I am a stenographer.

The Court: You write shorthand?

The Witness: I write shorthand, yes, sir.

Q. (By Mr. Kimmell): During the last years of Mr. White's life, isn't it a fact that you lived in a separate cottage on the grounds of Mr. White's home?

A. That is true. I lived in what they called the gardener's cottage, about 15 or 20 steps from the back door of the main house.

The Court: That is all right. Some of the places

(Testimony of W. N. Maguire.)

denominated as such in Santa Barbara and Palm Springs are castles.

The Witness: This was a castle, your Honor.

Q. (By Mr. Kimmell): Mrs. Maguire, do you know, of your own knowledge, of any occasion or any time when any copy or copies of this manuscript in question, "The Gaelic Manuscript," were on display or deposited in a public library or libraries in California or anywhere else, so that anybody, irrespective of persons, could call for it and see it?

A. No, I know of no such occasion.

Q. Do you know of any occasion when a copy or copies of the manuscript in question were on the shelves of a retail bookstore in California or anywhere else? [55]

A. I have no such knowledge, no, sir.

Q. Do you know of any occasion when copy or copies were in a commercial lending library?

A. No, sir.

The Court: To follow that up, except in this particular instance when Mrs. Oettinger asked permission to charge for the cost of typing additional copies, that any charge was made to anyone for——

The Witness: That is true. Mr. Stewart Edward White was amply able to pay me the costs incurred in doing the work I did.

The Court: With the exception of that request, you do not know of any instance where anyone paid money for a manuscript?

The Witness: That is true.

(Testimony of W. N. Maguire.)

The Court: The manuscripts were given to particular persons without compensation?

The Witness: That is right.

The Court: And not even the cost of mimeographing or dittoing that you talk about was charged?

The Witness: No.

The Court: Except the particular instance you speak about.

The Witness: Yes.

The Court: All you know is she asked for permission? [56]

The Witness: She asked for permission.

The Court: You do not know what she received?

The Witness: No.

The Court: Or from whom?

The Witness: No, I do not.

Q. (By Mr. Kimmell): Mrs. Maguire, do you know, of your own knowledge, whether or not Mrs. Oettinger was in any business, that is, any business of running a bookstore, retail bookstore, or public lending library?

A. She was not. She was the wife of an attorney and lived in her own home.

The Court: Where is she from?

The Witness: She lived in Palo Alto at the time the correspondence began, and later her husband moved to Portland, Oregon. The only business she mentioned in her correspondence to Mr. White was when she first projected the idea of making

(Testimony of W. N. Maguire.)

the copies of "The Gaelic Manuscript," and she said because of her three or four days work a week in this building called the National Transcribers of the Blind in Palo Alto, she had access to a mimeograph machine which she was at perfect liberty to use, to facilitate and make the work easier.

Q. (By Mr. Kimmell): That business had nothing to do with the retailing of books?

A. No, sir.

Mr. Kimmell: I think that is all. [57]

The Court: Do you have any redirect examination?

Mr. Mullen: None, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Mullen: At this time we have the deposition of Mrs. Oettinger, and it is agreeable with counsel, subject to whatever your Honor's pleasure may be, to read it in court, or if your Honor prefers we are willing to have it read in chambers.

The Court: If you will waive all objections in the record, then I will give it an exhibit number and order it transcribed in any record to be prepared on appeal, and I will read it between now and the afternoon session.

Mr. Mullen: So stipulated on the part of the plaintiff.

Mr. Kimmell: So stipulated on the part of the defendant.

The Court: That is the way I handle depositions. The only ones that I require reading of is where counsel insist on objections. Then, of course, I have to read portions enough to realize what it is all about.

Mr. Mullen: We offer the Oettinger deposition.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The said deposition of Margaret Oettinger was marked Plaintiff's Exhibit No. 4 and received in evidence, and is in words and figures as follows:) [58]

PLAINTIFF'S EXHIBIT No. 4

Deposition of Margaret Oettinger

Be It Remembered that on the 11th day of November, 1950, at the hour of 9:30 o'clock in the forenoon of said day, in the office of Rhoten & Rhoten, 311 Pioneer Trust Building, Salem, Oregon, personally appeared before me, J. Ray Rhoten, a Notary Public in and for the said County of Marion, State of Oregon,

Margaret Oettinger, a witness on behalf of plaintiff, for the purpose of giving her deposition at the request of plaintiff, pursuant to stipulation on file herein, and further stipulation hereto annexed;

Plaintiff appearing by Mr. J. Ray Rhoten, attorney at law, acting on behalf of Schauer, Ryon & McMahon, attorneys for plaintiff;

Plaintiff's Exhibit No. 4—(Continued)

Defendant Susan C. Kimmell appearing by Mr. Charles Lovett, attorney at law of Salem, Oregon, acting on behalf of Leslie F. Kimmell, attorney for said defendant;

Miss H. J. Bratzel, a competent, qualified shorthand reporter, having been appointed by me to report in shorthand the proceedings then and there had;

Thereupon the following proceedings were had, to wit:

Mr. Rhoten: It is stipulated by and between J. Ray Rhoten, acting on behalf of Schauer, Ryon & McMahon, attorneys for plaintiff, and Mr. Charles Lovett, acting on behalf of [59] Leslie F. Kimmell, attorney for defendant Susan C. Kimmell, that J. Ray Rhoten, having been appointed by stipulation dated October 27, 1950, between Schauer, Ryon & McMahon, attorneys for plaintiff, and Leslie F. Kimmell, attorney for Susan C. Kimmell, one of defendants, to act as notary public for the purpose of taking the deposition of Margaret Oettinger, a witness on behalf of plaintiff, and having been further appointed to act as attorney on behalf of plaintiff in the matter of said deposition, may so act for the purpose of propounding the interrogatories to Margaret Oettinger, and no objection will be raised to his acting in such capacities.

Mr. Lovett: That is correct and that is agreeable with the defendant Susan C. Kimmell.

Plaintiff's Exhibit No. 4—(Continued)

Mr. Rhoten: It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the deposition of Margaret Oettinger, a witness on behalf of plaintiff, may be taken before J. Ray Rhoten, a Notary Public for Oregon, as by law provided, and pursuant to stipulation, on this 11th day of November, 1950, at the hour of 9:30 o'clock in the forenoon of said day, at the office of Rhoten & Rhoten, 311 Pioneer Trust Building, Salem, Oregon, on oral interrogatories to be propounded to said deponent by respective counsel, pursuant to statutory provisions and this stipulation;

It is further stipulated that all irregularities as to [60] notice of time and place and manner of taking said deposition are hereby waived; that each party reserves the right to object at the time of the trial to any question or answer as to the competency, relevancy and materiality thereof, but the objections to the form of the questions are waived unless made at the time the question is asked; that said deposition may be used upon the trial of the within-entitled cause;

It is further stipulated that Miss H. J. Bratzel, a competent, qualified shorthand reporter, be and she is hereby appointed to take the proceedings and the whole thereof had in connection with the taking of the deposition of said Margaret Oettinger, and that she shall thereafter transcribe the same into typewriting, and when so transcribed the said

Plaintiff's Exhibit No. 4—(Continued)

deposition shall be read to or by the said Margaret Oettinger, and by her subscribed in the presence of J. Ray Rhoten, notary public for Oregon.

MRS. MARGARET OETTINGER

was thereupon first duly sworn by me, J. Ray Rhoten, Notary Public for Oregon, to tell the truth, the whole truth, and nothing but the truth, and was examined and testified as follows:

Direct Examination

By Mr. Rhoten:

Q. Where do you live, Mrs. Oettinger?

A. 874 Cascade Drive.

Q. In Salem, Oregon? A. Yes. [61]

Q. How long have you lived in this area?

A. Since March 8, 1949.

Q. And where did you live prior to that time?

A. Portland, Oregon.

Q. And you are acquainted with Stewart Edward White? A. Yes.

Q. And when did you become acquainted with him? A. In the spring of 1941.

Q. And where did you become acquainted with him?

A. I first saw him at his home in Burlingame, California.

Q. And did you visit back and forth with him after that? A. I was there twice.

Q. And was he ever over to visit you?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. No.

Q. Was the nature of your acquaintance with him with respect to a manuscript called "Old Gaelic" or "Gaelic"? A. Yes.

Q. And did you discuss that manuscript the first time you met him?

A. Yes, that was the purpose of my visit there.

Q. And had you heard of that manuscript prior to your meeting Mr. White? A. Yes. [62]

Q. And by any chance was through a Mrs. Kimmell? A. No.

Q. Now, this meeting with Mr. White, can you tell us the discussion which was had with Mr. White relative to the manuscript "Gaelic" or "Old Gaelic"?

A. Yes. Mr. White invited me and my friend, Ada Wyman, to come to his home to discuss the possibility of making further copies of "Gaelic."

Q. And then at that time—at Mr. White's home, yourself, Ada Wyman and Mr. White were present?

A. And my husband.

Q. And your husband. And can you tell us the conversation that took place there with respect to Gaelic or Old Gaelic manuscript?

A. Not verbatim.

Q. I understand that, but generally.

A. Mr. White said he had no objection to further copies being made. At that time he was not at all sure that he would ever publish it. He thought

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

that it was not necessary to publish it by itself. He had quoted from it in various books, and he thought it would be all right if we made some mimeographed copies.

Q. And was anything said at that time about your selling the mimeographed copies that you made of the manuscript?

A. There was no definite agreement made about it, but [63] he understood that I was to charge enough to pay for the materials, at any rate. In fact, he never made any specification or any definite statements at all about the matter of recompense for making the copies.

Q. And was there any statements at that time made with respect to where you would sell or distribute the manuscripts which you made, or the copies which you made?

A. No. I hadn't had very much experience with it at that time, and I knew of two or three people who wanted copies, and that is all I knew about it, that two or three people wanted copies, and he said he knew several people who would like to have copies, and he gave me from time to time the names of people who would like to have copies of this manuscript. Several of the copies I disposed of were sent to people whose names were given to me by Mr. White.

Q. Did you have a copy of the manuscript before you went to see Mr. White?

A. Yes. I had borrowed a copy from Mrs.—Dr

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Benner, I can't think what his name was—Katherine Benner. Katherine Benner of San Mateo.

Q. Did she have several copies?

A. I think she only had one. She might have—I don't know whether she had more than one or not.

Q. Was there any discussion at that time, and, if so, what was it, with respect to the circle of people that you [64] could distribute your copies to?

A. As far as I recall, he made no limitations at all on my disposal of copies.

Q. Did he—was there any discussion there at that time with respect to how many you could make or distribute?

A. No, he never mentioned any number at all. We started out to make—I can't remember positively how many we made. I thought it was thirty. I wrote to Ada Wyman and asked her if she remembered how many we made, and she said she thought it was fifty or sixty.

Q. At the time of the discussion there was nothing said about it?

A. No, he just gave us a free hand.

Q. With respect to the number and the people you could distribute to, and the price?

A. Yes. No price was ever mentioned between Mr. White and me.

Q. No limitation on the number which you could produce? A. No.

Q. Nor limitation on the people to whom you could distribute? A. No.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. Then you had another discussion with him later then about it?

A. No, the second time I went to see him wasn't about [65] that at all. It was about another matter.

Q. And when did you see him the next time then?

A. I think it was in January or February of 1942. It was just about that time.

Q. And you haven't seen him since that time?

A. No, I haven't. I have corresponded with him some, but I haven't heard from him.

Q. With respect to correspondence with him, I think you have a letter of May 18, 1945, from him, do you?

A. That is right.

Q. And do you have that with you?

A. Yes.

Q. And does that letter mention the "Old Gaelic"?

A. Yes.

Mr. Lovett: I think maybe you better introduce that.

Mr. Rhoten: I think so. May we have that? You might not get that back for a long time.

A. You better not take it then, because that is the only thing I have with his signature on it.

Q. Now, Mrs. Oettinger, I hand to you Plaintiff's Exhibit 1 for Identification and ask you what that is.

(Letter referred to handed to reporter and marked "Plaintiff's Exhibit 1 for Identification," and thereupon handed to witness.)

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. This is a letter that I received from [66] Stewart Edward White written on May 18, 1945.

Q. And of how many pages is it composed?

A. About a page and a quarter.

Q. And do you know the signature of Stewart Edward White? A. Yes.

Q. And does it appear thereon?

A. It does.

Q. And that is the letter which you received from him about that time? A. Yes, it is.

Q. We offer that into evidence with the understanding with counsel for the defendant, Susan C. Kimmell, that a photostatic copy may be substituted and placed with the deposition in place and stead of the original.

Mr. Lovett: That is agreeable with the defendant.

Mr. Rhoten: And you have no objection to it being introduced into evidence?

Mr. Lovett: No.

Mr. Rhoten: Are you authorized to allow it to be received?

Mr. Lovett: I have no instructions on that.

Mr. Rhoten: We better stipulate that neither attorney for plaintiff nor attorney for defendant acting for the purpose of taking this deposition have authority or information [67] with respect to whether the exhibits should be received in evidence in this proceedings, and therefore we cannot stipu-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

late as to its being received, but merely offered with no objection.

Mr. Lovett: That is agreeable. That is right.

Q. Did you ever have any further correspondence with Mr. White with respect to this matter?

A. I believe that was the last that I had.

Q. You had some previous correspondence with him, did you?

A. Yes, I did. I believe, though, that it was not concerned with "Gaelic," except when he sent me the names of people who wanted copies.

Q. And you have none of those letters?

A. No, I have none of those letters left.

Q. Was there any understanding at all with you, Mrs. Oettinger, and Mr. White with respect to your remitting to him any amount which you received from the sale of copies of "Gaelic"?

A. No, I never sent him a cent.

Q. Were you supposed to, with your arrangement with him?

A. No. No. Money was never discussed in any way.

Q. Do you have the original manuscript which you obtained from Mr. White? [68]

A. No, that was lost.

Q. And when did he give that to you?

A. Well, that was in the spring of 1941.

Q. At the time of your discussion with him?

A. Yes.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. And it was in your possession then for some time, was it?

A. It was in my possession until after we had made the copies in May. We made the copies, I believe, in May. No, June. That was dated June, 1941, the first set that we made.

Q. And that original manuscript that you obtained from him then was in your possession from the time you went to his home with your husband and Ada Wyman? A. Yes.

Q. Until subsequent to June of 1941?

A. That is right.

Q. And you don't know where the original is now?

A. No. Of course, that was a mimeographed copy. It was not the original manuscript. I don't know what form the original manuscript was.

Q. I understand that, but it was the original one that Mr. White gave to you? A. Yes.

Q. Do you have in your possession copies which you made from the original manuscript which was given to you? [69] A. That is right.

Q. And as I understand, you had them at the house where you were moving from?

A. That is correct.

Q. And at this point I believe we can stipulate with counsel for the defendant, Susan Kimmell, that Mrs. Oettinger could bring one in to incorporate into this record?

Mr. Lovett: Yes, I think we better make the

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

same stipulation that it can be offered. Did you plan on offering it in evidence?

Mr. Rhoten: Well, I think we might do that. However, as I understand your instructions, you are not authorized to consent to the receipt of it in evidence?

Mr. Lovett: That is right.

Mr. Rhoten: However, as I understand it, you have no objection to its being introduced? Therefore, we can stipulate that "Plaintiff's Exhibit 2 for Identification," which is the copy of "Gaelic," be offered into evidence here and be produced by Mrs. Oettinger in the next day or so, so as to be incorporated into this record of the deposition.

Mr. Lovett: Yes, that is correct.

(Reporter's note: The mimeographed copy of "Gaelic" was subsequently produced by deponent, Mrs. Oettinger, and was marked for inclusion in this deposition as "Plaintiff's Exhibit 2 for Identification.") [70]

Q. At the time you obtained the copy of the manuscript, or the manuscript as we call it here, from Mr. White, did he also give you some stencils, or mimeograph stencils?

A. No, we cut our own stencils.

Q. And he didn't send you any mimeographed stencils? A. No.

Q. And where did you have these stencils cut and the manuscript reproduced?

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

A. Well, Ada Wyman cut about fifty pages or so of the stencils, and I cut the remainder. I think there are one hundred forty-seven pages, I believe, altogether, and I cut the remainder.

Q. And where were they reproduced?

A. In Palo Alto.

Q. In some commercial shop?

A. No, in my home. We mimeographed them ourselves.

Q. You mentioned a few minutes ago, Mrs. Oettinger, that Mr. White said that he had not published the manuscript, I believe in the first discussion which you had with him about it?

A. Yes, and he——

Q. And did you discuss there as to what he meant by “publishing”?

A. No.

Q. Did he tell you whether or not he had made copies [71] of the manuscript and given to other people?

A. Yes, he had—I don't know how many he had made when he first had them made, but he said that they had all been given away.

Q. Did he say whether or not he had put the matter in book form?

A. I don't know that he said so in as many words. I certainly understood that he had not.

Q. In other words, you don't know what he meant when he used the word “publish”?

A. No, I don't know what he meant by that.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And that was not discussed there as to what he meant?

A. As I understand, he said, "I don't know if I will ever publish it." Or something like that.

Q. Did he ask you at any time not to put it in book form?

A. I believe that this—in this last paragraph in this letter he says something like that in the last paragraph there, "as long as it is not published," or——

Q. But that is the only——

A. That is the only thing I remember his ever saying, but, of course, he knew that I was not equipped to publish anything. I mean in book form.

Q. But prior to his letter of May 18, 1945, as far as [72] you can recall, there was no restriction about what you could do? A. No.

Q. With the manuscript?

A. In the discussion that we had about it, I believe that I made some kind of remarks about, "Of course, we will just mimeograph it and distribute it at—or to friends," or something like that. "Give these people that want copies." It wasn't—the whole thing was so informal that it is hard to remember even.

Q. But there was no definite limitation as to whom you could sell or give copies?

A. No, he never did.

Q. Now, with respect to this matter, apparently

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

from information, it had something to do with spiritualist group, is that correct?

A. Well, I don't believe there was an organized group. I never heard of any and they never did any public work. Mrs. White was what is sometimes called "Psychic" or a "sensitive" person, and she received this material which was not—very little of it was personal. It was a system of philosophy.

Q. Did your instructions from Mr. White have to do with limiting the distribution of this material to people who were interested in that particular phase? [73]

A. No, it didn't. It was almost obvious that no one else would want it. I mean unless they had an interest. They didn't have to believe it.

Q. But at no time was there any instruction from Mr. White or any one through him to restrict the distribution of the manuscript to that particular group?

A. No. No. I never belonged to any group, and I don't know that there was ever any group. We didn't have seances or anything like that.

Q. Now, are you able to tell us at this time, Mrs. Oettinger, that Mr. White allowed you the use of the manuscript for the purpose of reproduction and distribution without any claim of copyrights?

A. Yes.

Q. And were there no claims of copyrights by him? A. No.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And was there any limitation by him with respect to your distribution or sale? A. No.

Q. Either as to number or to whom the distribution or sale could be made? A. No.

Q. Your answer is "no"?

A. My answer is "no."

Q. Now, those which you did sell, what price did you [74] receive for them?

A. The first ones—the first lot we made, we got \$2 for.

Q. And subsequent to that time?

A. Then after I lent the stencils to Mrs. Duce, they came back, for some reason they had been so badly spoiled or damaged that the next bunch was—the bunch I made after that was very poor and I sold those for \$1.50.

Q. Now, when did you lend your stencils to Mrs. Duce?

A. In 1942, about as close as I could put it.

Q. And where does she live?

A. Berkeley, California.

Q. And do you know how many copies she had reproduced? A. I have no idea.

Q. How many did she send you?

A. She sent me two copies.

Q. Now, with respect to Mrs. Duce, did you contact Mr. White relative to permission to extend the stencils and copies to her?

A. Yes, I did, and I have a letter from him—I forgot that when you asked me if I had any further

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)
correspondence in regard to the manuscript. I had a letter from him saying, "That is just up to you. You do as you like."

Q. And you don't have that letter now?

A. I don't have that letter. [75]

Q. And about when was that that you received that letter from him? A. That was in 1942.

Q. And as you recall there were no restrictions at all relative to giving the stencils or Mrs. Duce's reproducing copies?

A. No. I wrote to him because I felt that it was really his property and asked him—told him that Mrs. Duce wanted to make copies and that I wanted to know if it would be all right to send her the stencils, and he said they were my stencils and if I wanted to lend them to her it would be all right; and I think that must have been in 1943 rather than 1942.

Q. Do you know whether or not there was any restriction placed by Mr. White on the number of copies or to whom distribution might be made by Mrs. Duce? A. I haven't any idea.

Q. You have no knowledge of such restriction?

A. I have no knowledge of anything to do with that at all.

Q. Now, with respect to Ada Wyman, who is she?

A. Well, she is a personal friend of mine.

Q. And where does she live?

A. I don't know whether she is still living in

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Bend. I had a letter from her yesterday from Palo Alto, but she [76] said their furniture was still in Bend, I believe.

Q. And where did she live at the time she went with you and your husband to Mr. White's place?

A. She lived at Palo Alto.

Q. And did she have anything to do with this matter with respect to the reproduction of the "Gaelic"?

A. Yes. She read the copy that I had borrowed of this manuscript and we discussed it, and we both thought that there was some very valuable material in the manuscript and that we would like to have copies. I called up Mr. White on the telephone and asked him if we could obtain further copies, and he said that there were no more copies, and either at that time or in a later conversation on the telephone I asked him if he would have any objection to any copies being made, and he then invited us to come over to his house and discuss the matter.

Q. And this was in 1941 or prior thereto?

A. Yes, it was some time early in 1941.

Q. And did she obtain at that time a copy of the manuscript, or copy of the "Gaelic" from Mr. White other than the one——

A. No, we just had the one copy and now that I think of it, it took us so long to cut those stencils that we may have obtained that permission late in 1940, because I was completely an amateur at cut-

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

ting and it took me forever to cut [77] those stencils.

Q. Did she have any of the stencils, or did she help you with making the stencils?

A. Yes, she did.

Q. And did she obtain the stencils after you had them for the purpose of producing copies herself?

A. No. No, she never had the stencils in her possession.

Q. And did she have copies for distribution or sale?

A. No, I did all of that. She had a copy.

Q. One? A. Yes.

Q. Do you know of any one else that had copies of the "Gaelic" or "Gaelic" besides yourself and Mrs. Duce?

A. Do you mean who had the stencils? Any stencils?

Q. Yes.

A. No. I know of numerous people who had copies of the manuscript.

Q. Prior to your obtaining your copies?

A. Prior to my obtaining it, the only ones I know for sure—the only one I know for sure who had it was this Katherine Benner and Mrs. Wilson in Palo Alto had a copy of it which she had copied from somebody else's copy. It was very incorrect. I don't know where she got it. Those are the only ones I know. [78]

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. As far as you know, yourself and Mrs. Duce were the only ones who had copies for the purpose of making extra copies and distribution or sale?

A. Yes, and she made hers from my stencils, so they were all from the same stencils. Those stencils have been destroyed now, if that is of any interest.

Q. Yes, it might be. When were they destroyed?

A. They were destroyed in 1945, right after I made the last set that I made.

Q. And where were they destroyed?

A. They were destroyed in Portland.

Q. And how many sets of copies did you make in 1945? A. Just one.

Q. Now, Mrs. Oettinger, you know who Sue Kimmell is, do you?

A. I know nothing about her except that she was a friend of Mr. White's.

Q. And did you ever meet her? A. No.

Q. Did you ever have any correspondence from her?

A. Yes, we exchanged letters three or four times.

Q. And beginning in what year, would you recall that you had correspondence from her?

A. Well, I think it must have been in 1944 and '5. I certainly hadn't had more than a letter or two from her [79] before Mr. White died.

Q. And with respect to the "Gaelic" was there any correspondence from her?

A. Yes, I mentioned to her that a friend of mine,

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Barbara Delkin, had told me that Mr. White had decided to publish "Gaelic." That probably he wouldn't want any more copies made.

Q. And you mentioned that in one of your letters to Mrs.—— A. To Mrs. Kimmell.

Q. And was that prior to receiving a letter of May 18, 1945, from Mr. White?

A. Yes, it was.

Q. And do you know whether or not that correspondence is the same matter which is referred to in the next to the last paragraph of Mr. White's letter? A. I assumed that it was.

Q. I believe that is all for the plaintiff.

Cross-Interrogatories

By Mr. Lovett:

Q. Mrs. Oettinger, do you know the plaintiff in this case, Harwood A. White? A. No.

Q. You don't know him at all?

A. I just received one letter from him—two letters from him. [80]

Q. You have stated that your acquaintanceship with Mrs. Kimmell was limited to an exchange of letters in 1945? A. That is true.

Q. You have never met her personally?

A. No.

Q. How did you happen to get hold of this manuscript originally, Mrs. Oettinger?

A. I borrowed it from Mrs. Katherine Benner in San Mateo.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. Why did you borrow it from her?

A. Well, I had seen a book that Mr. White had published called "The Betty Book," and I believe I mentioned that book to Mrs. Benner and said that I thought there were some things in there that were really very valuable, and she asked me if I had seen the "Gaelic" manuscript and I said no, and she offered to lend it to me.

Q. She had a copy? A. She had a copy.

Q. Could you tell us briefly, as briefly as you can, what was the subject matter of this "Gaelic" manuscript? What was it concerned with?

A. It purported to be material received from the spirit world and dealt with a philosophy for better living.

Q. Now, you say that you had previously read a book by Mr. White called "The Betty Book"? [81]

A. Yes.

Q. Briefly, what was the subject matter of that book?

A. That was very much the same. It was the first time that they had published anything of these experiments they had been carrying on for something like seventeen years, I believe, and they had said nothing about it because they were, themselves—for many years remained in a very skeptical attitude towards this material that Mrs. White kept getting. Finally they decided that regardless of its source it contained some very valuable philosophy and they would publish it at the risk of ridicule.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. And who was this that would publish it?

A. Mr. and Mrs. White. See, "Betty" was Mrs. White.

Q. Am I correct in understanding that the material in both of these documents, "The Betty Book" and the "Old Gaelic," was communications received by Mrs. White, and that Mr. White had merely recorded them and written them up in book form, is that correct?

A. I believe that some of the material in "Gaelic" was received by other persons besides Mrs. White. I believe that there is one passage that Mr. White received himself, although he was always very deprecatory about any ability that he had along that line.

Q. Your interest in these two books was in the philosophy of life that was represented by those books? [82]

A. That is true, that is true.

Q. Then after this copy of the manuscript had been loaned to you by Mrs. Benner, you read the manuscript?

A. Yes.

Q. And was it then that you became interested in reproducing it? After you had read it?

A. Yes, at first I had only hoped to obtain a copy for my own possession from Mr. White, and my friend, Ada Wyman, who read it while I had it also thought it contained some very valuable material and she wanted a copy, too, and when Mr. White had no—we found Mr. White had no more copies, we asked if he would object to our making some copies.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. It was then that you had this discussion in the spring of 1941, or thereabouts?

A. Yes, either late 1940 or early 1941, I think it must have been while it was still cold. We sat in front of the fire.

Q. And what was your purpose in reproducing copies of the "Old Gaelic"?

A. I am afraid I had kind of a missionary spirit in the matter. I thought it was too good for a lot of people to miss.

Q. To whom did you wish to distribute copies after you had made them?

A. Well, Mr. White said that he had received requests [83] from some of his friends where people saw it in some one's possession, and they read it and they wanted a copy for themselves, and that is the way that I got all of the contacts that I had for sending out these copies was indirectly through some one who saw somebody else's copy and wanted a copy, and said, "Where can I get it," and then eventually they came to me either through—sometimes through Mr. White and sometimes through Mrs. Kimmell, and sometimes I got letters from people who had seen a copy, I don't know where. One had seen one in the dentist's office.

Q. Were most of the people to whom you intended to distribute copies persons that were acquainted with the writings of Mr. White, or with people that were associated with Mr. White, or with

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

people that were associated with Mr. White in the work that he was doing at that time?

A. None of them as far as I know were associated in the work. I never did know who formed the group who were apparently present when "Gaelic" was received. I mean when the material was communicated. I think there were several people present because it mentions that different ones in the group would ask questions which would be answered, but I never did know who those people were, and I never knew any one who was associated with him in that actual work at all. But Katherine Benner wanted another copy, and I wanted some copies so that I could lend them, and when we first started, I didn't have any list of people that I was going to give [84] them to. It is just sort of—I still get letters about every three, four or five months. Somebody has seen a copy and heard that I had them.

Q. But originally most of the requests for copies came through Mr. White or Mrs. Benner?

A. That is right.

Q. Or Mrs. Kimmell? A. That is right.

Q. Or some of the people that knew Mr. White and knew of the work that he had been doing?

A. That is right. You see they knew him personally. I didn't know him personally until this matter came up.

Q. Then I understand you cut these stencils in late 1940 or early 1941? A. That is right.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And you had them in your possession through 1945, at which time you destroyed them?

A. That is right.

Q. Except for a period in—you didn't say what date.

A. I think it must have been in 1943.

Q. When Mrs. Wyman——?

A. No, Mrs. Duce.

Q. Mrs. Duce borrowed them from you?

A. Yes.

Q. That is correct. Why were the copies of the [85] stencils destroyed in 1945?

A. They had become very badly damaged. There is a certain routine to caring for stencils to preserve them, and that routine had not been observed and the stencils had been so badly damaged, and I wasn't able to make really presentable copies the last time I did it. I cleared them up some, but some of the pages were barely legible, and I just decided it wasn't worth while bothering with.

Q. And you never made any additional stencils after those original ones were destroyed?

A. No. No.

Q. Those were the only ones you had?

A. Yes, I cut one page that was so badly ruined I couldn't use it at all. I cut it over.

Q. But other than that you didn't produce any stencils of the original manuscript after that time?

A. No.

Q. And you have none now? A. No.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. Then you said that you had seen Mr. White a total of two times? A. Yes.

Q. The original time was when you went there to discuss the possibility of making copies of the manuscript? A. Yes. [86]

Q. And then again, I believe you said, in 1942?

A. Yes, that was about the time.

Q. What was the occasion of your second visit to see Mr. White?

A. Well, I just wanted to discuss with him if Betty had ever offered any explanation of certain spiritual phenomena that had nothing whatever to do with the manuscript.

Q. I see. You didn't discuss anything about the reproduction or the distribution or anything in connection?

A. As far as I know it was never mentioned, except as I was leaving, I said, "By the way, in 'Gaelic' it appears that you might have received some of the communications yourself." And he said, "I believe there was one time." He said, "I never was any good at that sort of thing," or something like that; and that was just as I was going out of the door.

Q. And then other than letters you never had any personal contact? A. No. No.

Q. With him?

A. No. Mr. White was a writer and had had experience with publishing and copyrights and so

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

on. It certainly wasn't through ignorance that he was so free with this business.

Q. Am I correct in understanding that you made a total of two sets? [87]

A. No, I made three.

Q. You made three sets of copies altogether?

A. Yes.

Q. Now, as nearly as you can remember what was the total number of copies that you made altogether in the three sets?

A. Oh, Ada Wyman and I have different impressions about the first set that we made.

Q. What is your personal recollection?

A. My recollection was that we made thirty or forty copies. She thinks——

Q. The first time?

A. Yes.

Q. The second?

A. I think I made forty the second time.

Q. And the third?

A. And I think I made forty the third time.

Q. So altogether, according to your recollection it would be a total of one hundred twenty? Roughly forty in each of the three batches?

A. Yes.

Q. And I believe you sold the first batch for \$2, is that correct?

A. Yes.

Q. How much did it cost you to reproduce these copies? [88]

A. I never kept any books on it. With the copies I also furnished a binder and——

Q. Would you say that the \$2 which you charged

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

was in excess of what it cost you to reproduce the manuscript?

A. It was somewhat in excess of materials. Certainly not anything like compensation for the time we put in.

Q. And would that also be true of the second and third sets of copies you made? A. Yes.

Q. Those were sold for \$1.50 each?

A. Yes, I think I sold—the third one was sold for \$1.50. I think the second one was sold for \$2. I didn't think it was quite as good a job of mimeographing, but everything had gone up by that time so I still charged \$2 for those. Ada Wyman had had experience in mimeographing more than I, and she did most of the mimeographing on the first set, and it was done better than I did it.

Q. Then after the copies were made, did you keep them personally yourself? A. Yes.

Q. And you made distribution yourself of all of the copies? A. Yes.

Q. Mrs. Wyman didn't make any distribution?

A. She didn't make any at all. [89]

Q. To whom did you make distribution as nearly as you can remember of these various copies that you received?

A. I don't have a complete list. I have a list barely complete of the first set.

Q. Would you sell them to any one that would ask for a copy? A. Why, sure.

Q. And would pay the \$2? Did you place any

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

copies in the public libraries in California, or any place? A. No. No.

Q. Or anywhere else? A. No.

Q. In other words, you personally retained all the copies? A. Yes.

Q. And disposed of them yourself?

A. Yes, I have never disposed of all of the last set, and I think I am in the hole on that one.

Q. You still have some available from the last set?

A. I still have some, and I offered to destroy them when I wrote to Mr. Harwood White, and he said that wouldn't be necessary; that I could do whatever I wanted to with them.

Q. Did you either personally or through your friends know all of the people that asked you for copies?

A. No. I had letters from people mostly around Los [90] Angeles that I never heard of before, but they had seen a copy somewhere and heard that I had them and I sent them a copy.

Q. You have no personal knowledge whether these people then were particularly interested in the spiritual or philosophical work that was represented in these?

A. Well, they nearly always mentioned in their letters that they had seen it and that they felt it was very valuable material and that they would like to own a copy, and sometimes they were very enthusiastic about the material.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. You were not engaged in the bookstore business or lending library business yourself at any time during this period? A. No. No, never.

Q. I believe you stated—now you correct me if I am not right, that you wrote Mr. White and asked him if it would be all right with him to let Mrs. Duce have the stencils? A. Yes, I did.

Q. To make some copies. Why did you write Mr. White for permission to do that?

A. Well, I felt that essentially the manuscript was his property and that he had allowed me to make the stencils and while I had no reason to suppose that I was—would be particularly favored in that regard, still I thought that maybe I should ask him if it was all right for me to let Mrs. [91] Duce have them.

Q. Now, I also seem to recall that somewhere in your testimony you mentioned the fact that Mr. White didn't want the manuscript reproduced or published in book form?

A. No, I don't know that he didn't want it. He just mentioned in the beginning that at that time he had no plans for publishing it in book form. The other books that he published were a little more on the popular vein than this manuscript was.

Q. He stated that? That was in the conversation that you and Mrs. Wyman and your husband had?

A. Yes.

Q. That was the first time you went to visit him?

A. Yes.

Plaintiff's Exhibit No. 4—(Continued)

(Deposition of Margaret Oettinger.)

Q. And he stated then he had no present plans for publishing this manuscript in book form?

A. Yes.

Q. But he had no objection to your reproducing it by mimeograph? A. That is right.

Q. I think that is all.

Redirect Interrogatories

By Mr. Rhoten:

Q. Mrs. Oettinger, with respect to your correspondence with Mr. White, at no time did he restrict you with respect to whom you could give the manuscript or copies, or even the [92] stencils of it.

A. No, as far as I know I could have lent the stencils to any one as far as any agreement I had ever made with him.

Q. There was no restriction whatever in that regard? A. No restriction whatever.

Q. Was there any restriction whatever, at all, at any time with respect to whom you could give copies or sell copies of the manuscript? A. No.

Q. Now, with respect to the last conversation which you had with Mr. White, as I recall your testimony, was that he told you that only one passage in "Gaelic" was his communication?

A. Now, I couldn't swear that he only said one. He said—as an indirect quotation I would say that he said there was very little indeed that he got himself.

Plaintiff's Exhibit No. 4—(Continued)
(Deposition of Margaret Oettinger.)

Q. Do you recall whether or not he told you from whom the communications had come? Or to whom?

A. They came to Mrs. White I think. If I recall correctly there is one place in the manuscript where it says something about another "station." A "station" is a person who is receiving communications, and so that would imply that there was someone else there besides Mrs. White who was receiving communications.

Q. Did Mr. White ever tell you that Mrs. White received [93] substantially all of the communications?

A. Yes. Yes.

Q. He told you that at your second meeting, or the first?

A. Both times, I believe.

Q. In other words, substantially all the material in "Gaelic" then is through Mrs. White?

A. Yes.

Q. I believe that is all.

The foregoing has been read by me and is a correct transcript of my deposition herein.

/s/ MARGARET OETTINGER,
Deponent.

The Court: You have talked about some exhibits attached to the deposition. Those should be detached and given numbers.

Mr. Mullen: Your Honor, the first exhibit attached to that deposition has been heretofore identified and admitted as No. 3.

The Court: All right. Are there any other exhibits attached to the deposition?

Mr. Mullen: Yes, I believe there is a manuscript, a blue-covered manuscript, entitled, on the flyleaf, "The 'Gaelic' Manuscript, reproduced by permission of Stewart Edward White," and on the inside cover bearing the handwritten signature of [94] "Margaret Oettinger," and on the outside cover marked "Plaintiff's Exhibit 2 for Identification."

We offer this as the second exhibit to the Oettinger deposition.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The document referred to was marked Plaintiff's Exhibit No. 5 and received in evidence.)

Mr. Mullen: At this time, your Honor, I have in hand the deposition of one Harriet W. Jones that was taken in Santa Barbara, with Mr. Kimmell appearing on the part of his client, and myself on the part of the plaintiff in this action.

Unfortunately, this deposition has not been signed by the deponent. However, Mr. Kimmell is willing to stipulate it may be received unsigned with the same force and effect as though written, signed, and corrected by the witness.

Is that correct, Mr. Kimmell?

Mr. Kimmell: I so stipulate.

Mr. Mullen: We ask that be received under the same stipulation, your Honor, as the Oettinger deposition, and received.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(The said deposition of Harriet W. Jones was marked [95] Plaintiff's Exhibit No. 6 and received in evidence, and is in words and figures as follows:)

PLAINTIFF'S EXHIBIT No. 6

Deposition of Harriet W. Jones, produced as a witness on behalf of plaintiff, taken before Dudley L. Hossack, a Notary Public in and for the County of Santa Barbara, State of California, at the offices of Schauer, Ryon & McMahon, 26 East Carrillo Street, Santa Barbara, California, on Friday, October 27, 1950, at the hour of 11:00 o'clock a.m., pursuant to stipulation.

Appearances:

SCHAUER, RYON & McMAHON, By
ROBERT W. McINTYRE, ESQ., and
THOMAS M. MULLEN, ESQ.,
For plaintiff.

LESLIE F. KIMMELL, ESQ.,
For defendants.

Plaintiff's Exhibit No. 6—(Continued)

HARRIET W. JONES

produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. McIntyre:

Q. Mrs. Jones, would you state your name, please? A. Harriet W. Jones.

Q. Now, were you acquainted with Stewart Edward White during his lifetime? A. I was.

Q. How long did you know him?

A. All my life. [96]

Q. Now, directing your attention to the period—are you familiar with a manuscript which Stewart Edward White had, which he caused to be written up and which he called the “Gaelic” manuscript or the “Old Gaelic” manuscript? A. Yes, I am.

Q. Now, I show you a document here—or a volume, and ask you if you would look at it and state whether or not that is a copy of the “Gaelic” or “Old Gaelic” manuscript

(Exhibiting document to the witness).

A. Yes, it is.

Mr. Kimmell: Is it anticipated that that document will be introduced?

Mr. McIntyre: At the trial. I think it would be better at the trial or it may be stipulated that the document will be—we might have it identified, if you would like.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Mr. Kimmell: Possibly it would be wise to.

Mr. McIntyre: It will be identified, but it will be admitted at the trial.

Q. Have you read this manuscript?

A. Yes.

Mr. Kimmell: Mr. McIntyre, shall we identify it now?

Mr. McIntyre: I guess it would be a good idea. We will offer this for purposes of identification—this manuscript—which has on its face the name of Roderick Juan White and is entitled the “Gaelic mss.,” and the fly-leaf is inscribed [97] “Gaelic manuscript, reproduced by permission of Stewart Edward White.” We will offer it for identification at this time as Plaintiff's Exhibit 1.

(The document was thereupon marked
“Plaintiff's Exhibit No. 1 for identification to
the deposition of Harriet W. Jones.”)

Q. Now, directing your attention, Mrs. Jones, to the period of around '40 or '41—the year of 1940-1941, did you have occasion to have a discussion with Mr. Stewart Edward White relative to this “Old Gaelic” manuscript? A. Yes, I did.

Q. Will you state generally the gist of that conversation. Can you state approximately when that occurred?

A. Well, not exactly. It was '40 or '41—around in that general time.

Q. Where did this discussion take place?

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

A. At his home.

Q. And who was present?

A. Just the two of us.

Q. Would you state generally the gist of the conversation.

A. It was merely the discussion of a mutual friend of ours, Mrs. Oettinger, who had asked permission to use this material and put it in this shape in order to sell it and pass it about, and that he had given her permission. [98]

Q. He stated that to you? A. Yes.

Q. Is that the substance of the conversation?

A. Well, just that he seemed pleased that it was being done. I don't remember the details of the conversation.

Mr. Kimmell: I move to strike out "he seemed pleased." I don't know that that is germane.

Mr. McIntyre: I will make further inquiry as to that.

Q. Did he say that he was pleased that she was doing this? A. Yes, I am sure that he did.

Q. Now, you are acquainted with a Mrs. Margaret Oettinger or Oettinger? How do you pronounce that? A. Oettinger, I think.

Q. Oettinger. A. Yes.

Q. Did you have occasion to obtain any copies of this manuscript from her? A. Yes, I did.

Q. Will you relate what occurred in that respect.

A. Well, I knew her and she had told me the circumstances, and that she had the books, and I

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

asked her even before they were finished if she would send me one as soon as they were ready, which she did, by mail, and I sent her the money [99] for it.

Q. Approximately how much did you pay for it?

A. I am almost positive it was \$2.

Q. Did you ever obtain any further copies?

A. Yes. Subsequently members of my family wanted copies, so I wrote and got extra ones.

Q. How many?

A. Well, two, to my knowledge.

Q. And what did you pay for those?

A. \$2.

Q. You paid \$2 apiece? A. Yes.

Q. To Mrs. Oettinger?

A. Yes, I know positively I paid \$2 for the later ones.

Q. Approximately what was the date or about what period of time did this occur?

A. I don't know. The first one, I know, is when they were first printed, because I waited for it.

Q. Do you recall when that was—in what year?

A. Well, I would say '40 or '41, just generally.

Q. Have you a general idea of the date or the time? A. No, I am sorry.

Q. Well, how close could you put it?

A. You mean the month or the year?

Q. No, no. The year that you got the second two, or the approximate year. [100]

A. The second two. Well, it could have been some years later.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

Q. One, two or three?

A. It could have been three.

Q. Do you think it was prior to 1945 that you received them? A. I really couldn't say.

Q. But it was before Stewart Edward White's death, however? A. Oh, yes, before.

Q. Do you recall the date of Stewart Edward White's death, approximately.

A. I am sorry. I have got a horrible memory.

Q. What did you do with these volumes you received?

A. I sent them to the people who had asked for them.

Q. Now, how did you obtain these from Mrs. Oettinger? What medium did you use?

A. I wrote her a letter and asked her for several more copies, and sent her the check in the letter.

Q. When you received the copies—all three of them—at any time when you received copies of this manuscript from Mrs. Oettinger, was any restriction placed on the use you could make of them?

A. No.

Q. Was anything said about any [101] restriction? A. Nothing.

Q. Or limitation? A. No.

Mr. McIntyre: I think that is all, Mr. Kimmell. You may cross-examine.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Cross-Examination

By Mr. Kimmell:

Q. Mrs. Jones, was Mrs. Oettinger in the business of retailing books, do you know?

A. Not that I know of, other than this particular book.

Q. She wasn't in the book retail business?

A. Not to my knowledge.

Q. How long have you known Mrs. Oettinger?

A. I had known her casually for about a year, I would say.

Q. You would not say that you know her well?

A. Not intimately.

Q. Do you know her well enough to know whether or not at the time you got these books from her she was in any kind of business, particularly the book retail business? A. No.

Q. Referring to your conversation with Mr. White, just what was brought out in that conversation, so far as Mrs. Oettinger's connection with this book was concerned—this manuscript? [102]

A. Well, he knew that I was interested in the manuscript, and he also knew that I was a friend of Mrs. Oettinger's, so it was a perfectly natural conversation in connection with the two, and that she had come and asked if she might do it, and that he had allowed her to do it.

Q. Mr. White had allowed her to make copies of the manuscript? A. Yes.

Plaintiff's Exhibit No. 6—(Continued)

(Deposition of Harriet W. Jones.)

Q. Did he indicate how many copies?

A. No, I don't remember that there was anything said about the number.

Q. Was there anything said in that conversation with Mr. White as to the persons or type of persons that the manuscript should be given to?

A. No, never.

Q. Who fixed the price of \$2 a copy for the copies of the manuscript in question?

A. I have no idea.

Q. Well, who told you that the price would be \$2 per copy?

A. Well, it must have been Mrs. Oettinger. My understanding was that that would be an adequate amount to make the book possible.

Q. Now, just what do you mean by an adequate amount to make the manuscript possible? [103]

A. That is a mere supposition on my part. I don't remember that there was any discussion with Mrs. Oettinger about why or how much, except that I knew the amount and paid it.

Q. Can you tell me how you knew the amount?

A. Because she told me.

Q. She told you. Did she indicate what the \$2 was for? Was that the retail price or the cost of producing the manuscript or just what was it?

A. I don't know. She simply told me it was \$2, and I sent her \$2. I don't remember any conversation as to the details of that at all.

Q. Mrs. Jones, had you ever known of this manu-

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

script or copies of the manuscript being available to the general public in any retail book store?

A. No.

Q. Have you ever known of the manuscript or copies of it being available to the general public in a public library? A. No.

Q. Do you know that the manuscript or a copy of it had been available to the general public in any other matter out of either retail book stores or public libraries?

A. Yes. By free circulation among all the people who owned copies.

Q. How many people owned copies? [104]

A. I couldn't say. I would say five or six, that I know of, who have had them over the years. I know my own family and my brother-in-law and my nephew, and I am sure some people here in Santa Barbara. I mean, I am just supposing, but I take it for granted they naturally would, because they were all eager for it and waiting for it.

Q. I think you ought to confine your answer to what you actually know.

A. All right. I am sorry.

Q. You actually know that five or six individuals have had copies of this manuscript? A. Yes.

Q. And beyond that you have no knowledge?

A. No.

Mr. Kimmell: I think that is all.

Plaintiff's Exhibit No. 6—(Continued)
(Deposition of Harriet W. Jones.)

Redirect Examination

By Mr. McIntyre:

Q. Among those five or six people, one of them was Mr. Stewart Edward White, was it not?

A. Who had a copy?

Q. Yes. A. Oh, certainly.

Q. He had a number of copies, did he not?

A. Yes, he did.

Q. And circulated them to anybody who wished to borrow [105] them and read them?

A. Yes.

Mr. McIntyre: That is all.

Recross-Examination

By Mr. Kimmell:

Q. How do you know that Stewart Edward White circulated copies among other people—his friends or acquaintances?

A. That is a question that I cannot answer by saying I saw him do it, but I just know that he did, because we discussed the fact that people were anxious to read it and that he had loaned it to them. I don't know specific people that he handed it to.

Mr. Kimmell: I think that is all.

Mr. McIntyre: That is all.

Mr. Mullen: As an exhibit to the deposition of Harriet W. Jones there is a further manuscript

which is marked on the cover "Plaintiff's Exhibit No. 1 for Identification, to the deposition of Harriet W. Jones," and signed by "Dudley L. Hossack, Notary Public."

We will at this time offer that exhibit in evidence.

The Court: It may be received.

The Clerk: **Plaintiff's Exhibit 7 in evidence.**

(The document referred to was marked Plaintiff's Exhibit No. 7 and received in [106] evidence.)

Mr. Mullen: At this point, your Honor, the plaintiff rests.

The Court: So long as I have this material to look over, we will take a recess until 2:00 o'clock, at which time we will continue and hear the evidence on the part of the defendant. By that time I will have completed the reading of the depositions.

(Whereupon, at 12:00 o'clock, noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [107]

Wednesday, November 29, 1950. 2:00 P.M.

The Court: Gentlemen, the record will show that since the morning session I have read the deposition of Mrs. Margaret Oettinger and the deposition of Mrs. Harriet W. Jones, and the exhibits which were introduced in conjunction with them.

Mr. Kimmell, put on your proof.

You had rested, Mr. Mullen?

Mr. Mullen: I had rested.

Mr. Kimmell: Mrs. Susan Kimmell.

SUSAN CRANDALL KIMMELL

called as a witness in her own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Susan Crandall Kimmell.

Direct Examination

By Mr. Kimmell:

Q. Where do you live, Mrs. Kimmell?

A. Laguna Beach, California.

Q. You have a business or occupation?

A. I am a housewife and a part-time book reviewer and literary agent.

Q. How long have you been a literary agent?

A. The past two years. [108]

Q. How long a book reviewer?

A. Since 1934.

Q. You knew Stewart Edward White during his lifetime? A. I did.

Q. He died when? A. September 18, 1946.

Q. How long did you know him prior to the date of his death?

A. Beginning with the summer of 1937 I corresponded with him, correspondence which continued for the rest of his life.

In the summer of 1940 I first met him, when he came to visit us at Laguna Beach.

Q. You kept up a personal contact with him subsequent to that date? A. Yes, I did.

Q. He visited in your home in Laguna Beach several times? A. Yes, he did.

(Testimony of Susan Crandall Kimmell.)

Q. You and members of your family visited him in his home in Burlingame, California?

A. Yes, we did.

Q. You had a common interest with Stewart Edward White in the general subject of metaphysics?

A. Yes, sir. [109]

Q. Did you work with or assist Mr. White in any way in his metaphysical activities?

A. Yes, I did.

Q. What did you do?

A. On the occasions when I visited him I talked with him a great deal about his plans for his books or, rather, he talked with me.

He liked to discuss the ideas he had in mind and get suggestions as to material that might be incorporated.

After writing a rough draft he would bring it in to read to me, and we would discuss it, and I, being naturally less experienced than he, could sometimes give him a point of view of the more or less novice.

Then in connection with one of his books in particular, "The Stars Are Still There," he had had a great deal of—I did some work. He had had a great deal of correspondence, following particularly the publication of "The Unobstructed Universe."

Many people wrote him from all over the country asking him questions about his philosophy and views on his personal attitude of living. It occurred to us it might be interesting to found a book or base a book on that material.

I took some hundred carbon copies of his replies

(Testimony of Susan Crandall Kimmell.)

and classified them according to the type of question that had been asked. It turned out to be about 83 different [110] categories of questions that people had asked him on all sorts of subjects pertaining to, one might say, the technique of living.

I indexed those and classified them. He wrote the book, "The Stars Are Still There," based on that material, on his replies to previous correspondence, and elaborating on the questions that were most generally asked. I helped.

Then I made indexes for his later books. I worked quite extensively on "Anchors to Windward."

We carried on a sort of, as he called it, guinea-pig test. I took copies of the manuscript down to Laguna Beach with me and showed them to about thirty of my friends, getting their comments and questions.

We then went over the manuscript page by page, according to those comments, some of which he incorporated into the material and some of which he, of course, ignored.

Q. For how long a period had Stewart Edward White been a student of this general subject of metaphysics, to your knowledge?

A. I believe from about the year 1917. His wife, Betty White, was also a student of that subject. Harwood has already said that it was through Betty White's experiences that Stewart White became interested. He has often told me how skeptical he was of all this sort of thing until it was proven beyond his ability to withstand it. [111]

(Testimony of Susan Crandall Kimmell.)

Q. You have been a student of this general subject, also? A. For the past 20 years.

Q. Can you list the number of books on metaphysical subjects which Stewart Edward White has written?

A. There were 10 all together: "Credo," "Why Be a Mud Turtle?" "The Betty Book," "The Unobstructed Universe," "Across the Unknown," "The Road I Know," "Anchors to Windward," "The Stars Are Still There," "With Folded Wings," "The Job of Living."

Q. Can you tell the court briefly what is your impression of what this philosophy of teaching of Stewart Edward White was?

A. It was based on a belief in the continuity of consciousness. Not in the sense that the spiritualists use it, in a more or less possibly superstitious way. It might be considered as an analogy to the tenets of the physicists, who have proved the indestructibility of matter.

Stewart White believed there was an analogy in that and the human spirit. The human spirit was likewise indestructible. Therefore, his teachings were based on that attitude, with the belief that immortality is right here and now and it behooves us to live accordingly.

Q. Would you say that in general his beliefs were the same as Eileen Garrett's, the publisher and editor of "Tomorrow" [112] magazine, and of other well-known and respected students in that field?

A. Yes, I would.

(Testimony of Susan Crandall Kimmell.)

Q. You know Eileen Garrett personally?

A. I know her intimately.

Q. You have discussed Stewart Edward White's work with her?

A. Yes, I have. I met Eileen Garrett through Stewart Edward White.

Mr. Mullen: I believe I would have to object to that as hearsay.

The Court: It is merely a little background. You should not go into the matter further. I am not interested in the validity of the person's beliefs. I do not think they are involved in this case.

The main question here is the right of ownership of particular property or whether it is in the public domain.

Mr. Kimmell: I don't want to encumber the record with material that is not germane, but I thought it might be of interest as background.

The Court: All I am interested in is the validity of the matter.

Q. (By Mr. Kimmell): Do you know the source from which "The Gaelic Manuscript" came?

A. I believe that the statement that Harwood White made [113] this morning covers that very adequately, so far as I have been informed by Stewart White, that it was received by him through so-called "invisible" or "discarnate" entities.

Q. Will you state when, where, how, and under what circumstances you first saw a copy of "The Gaelic Manuscript"?

A. I first saw fragments of "The Gaelic Manu-

(Testimony of Susan Crandall Kimmell.)

script" which Stewart White sent to me in reply to some questions I had asked him. He sent me several mimeographed pages.

Then later—that was in the summer, I believe, of 1940. Then later that fall he sent me a blue-bound copy of the mimeographed "Gaelic" material. This was alone, and he told me I must be sure to return it.

Mr. Kimmell: Your Honor, attached to the deposition of either Don Stevens or Mrs. Terry Duce is a copy of this manuscript.

The Court: We already have two copies. Where is the third one?

They look, on examination, to be the same. They begin the same way, anyway. The pages are different, because of the manner of binding.

Mr. Kimmell: This is the deposition of Don Stevens, that I have just had opened.

Your Honor, will you handle this in any way you please? I want to identify that as the copy which she first received.

The Court: This has an index. I think it begins the [114] same way. We will take this manuscript, which is marked as Exhibit A for identification to the deposition of Stevens——

Mr. Kimmell: For the record, may we read what appears on the blue page, just inside of the manila cover?

Mr. Mullen: Might I examine that before it is read?

Mr. Kimmell: Yes. It is just a stamp. It says,

(Testimony of Susan Crandall Kimmell.)

“Return to Stewart Edward White, Burlingame, Cal.”

Q. (By Mr. Kimmell): You don't recognize the writing there, to say——

A. Yes, I would. His writing was very characteristic.

Q. You think that is his “Return to” above the name?

A. Yes. And this “#26” which shows it was No. 26 among the copies he had made.

The Court: Go ahead from there.

Mr. Mullen: I move to strike the observation that the number “26” meant it was the No. 26 copy that he had made.

The Court: That may be stricken, yes. The number is there. It says “#26.”

Mr. Mullen: Unless he told you that. Did he ever tell you that, Mrs. Kimmell?

The Court: Let's not go into that. You can ask that later. I am striking it. Later you may bring that out.

Q. (By Mr. Kimmell): The manuscript you have in your hand is the first manuscript which you received from Stewart Edward White? [115]

A. Yes, it is.

Q. About what date was that?

A. The fall of 1940.

Q. Did he give you or loan it to you at that time?

A. He loaned it to me.

Q. Did he later give you the manuscript?

A. He later gave it to me, when he permitted

(Testimony of Susan Crandall Kimmell.)

Mrs. Oettinger to make other copies, so that he had more copies.

Q. Do you know Mrs. Margaret Oettinger?

A. I have never met her. I have had brief correspondence with her.

Q. She is also known sometimes as Mrs. Frank Oettinger?

A. I believe so.

Q. Did you ever receive a letter from Stewart Edward White in which he referred to Mrs. Oettinger's making or having made copies of this manuscript?

A. Yes, I did.

Q. I show you a letter bearing in the upper left-hand corner the words "Stewart Edward White," and in the upper right-hand corner the words "Little Hill, Burlingame, Cal.," and bearing the date "November 18, 1940."

I will ask you if you ever saw this paper with the typewriting on it before.

A. Yes, this came to me.

Q. In your correspondence with Mr. White, how did he [116] sometimes sign his name?

A. Usually just "SEW."

Q. That bears the signature "SEW"?

A. It does.

Q. Do you recognize the handwriting?

A. I do.

Q. Whose handwriting is it?

A. Stewart Edward White's.

Q. Will you read the pertinent parts of that letter?

(Testimony of Susan Crandall Kimmell.)

Mr. Mullen: Before you do that, I would like to examine it, if I may, Mr. Kimmell.

Mr. Kimmell: I am sorry, Mr. Mullen.

Mr. Mullen: I have no objection to that being offered in evidence, Mr. Kimmell. I believe the letter is the best evidence of its contents.

The Court: He is not asking her to read it to me. I can read it. She does not have to read it.

If you wish to ask questions based on it, all right.

The Witness: Just the first paragraph is pertinent, your Honor.

The Court: That is all right. Go ahead.

Q. (By Mr. Kimmell): Does that letter set forth any limitation with reference to the distribution of this manuscript in question?

A. It says—— [117]

Mr. Mullen: I object to the question on the ground that the letter is the best evidence of its contents.

The Court: What is the question?

Mr. Kimmell: Does the letter set forth any limitation on the distribution——

The Court: That is asking her to interpret the letter. The objection will be sustained. I will have to interpret it, as to what it says.

Mr. Kimmell: I will offer the letter in evidence. I have a photostatic copy.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A and received in evidence.)

(Testimony of Susan Crandall Kimmell.)

The Court: She probably will want to keep it.

Mr. Kimmell: I have a photostatic copy.

The Court: It may be received in lieu of the original. It is clearer.

The Witness: Yes, it is.

The Court: It is clearer than the original.

Mr. Kimmell: Here is a copy for you, Mr. Mullen.

Mr. Mullen: Thank you very much, Mr. Kimmell. I appreciate that.

Q. (By Mr. Kimmell): One more thing in connection with that letter. Mrs. Kimmell, referring to this letter, does it [118] carry any stenographer's identifying symbol? A. No, it does not.

Q. Did you ever discuss with Stewart Edward White the arrangements which he made with Mrs. Oettinger?

A. Yes, I did, the next time I saw him after this letter.

Q. What did he say with reference to any limitations?

Mr. Mullen: Might we have a foundation, Mr. Kimmell, as to time, place, and persons present?

Q. (By Mr. Kimmell): When did this occur and where was it and who were present?

A. I was there alone. I couldn't give you the exact date. It was the spring of 1941, if I am not mistaken, when I next visited him.

Q. What did Mr. White say? Did Stewart White say anything with reference to limitations?

A. He said that Mrs. Oettinger was making these

(Testimony of Susan Crandall Kimmell.)

copies. She had been introduced to him by a mutual friend, Katherine Benner, of San Mateo. He felt her to be a woman of discretion and he could trust her not to broadcast the copies generally, but to use care as to the people to whom she gave them.

Q. Do you know Mrs. Terry Duce?

A. Yes, I do.

Mr. Kimmell: May I withdraw that question, your Honor, for the time being? [119]

Q. (By Mr. Kimmell): When did Stewart Edward White give you this manuscript, introduced in evidence?

A. It was following the letter which has been introduced, which gave—in which he told me he had given Mrs. Oettinger permission to have copies made of the “Gaelic” material.

He said that I might then keep the copy he had given me, because there would be more made by mimeograph.

Q. When he gave you the copy, did he put any limitations on the use of it by you?

A. Very definitely.

Q. What were those limitations?

A. He told me that this was not to be published, that he wanted it guarded very carefully and shown only to people who were particularly interested in the subject and in whose discretion—or, whose discretion could be relied on, who would not copy any portions of it or produce any portions for publication.

Q. Did you ever procure any of the copies which

(Testimony of Susan Crandall Kimmell.)

were made by Mrs. Oettinger? A. Yes, I did.

Q. How many?

A. Three or four, for friends of mine who wanted copies of "Gaelic."

Q. What instructions did you give them when you [120] delivered the copies to them?

A. I passed on the instructions that Stewart White had given me, and I was very careful not to show these copies to anyone who I felt would not carry out the limitations imposed on me and therefore indirectly upon them.

I told them it must, under no conditions, be reproduced in any form, and only shown to definitely interested people who appreciated the material in it.

Mr. Mullen: I would like to move to strike the answer of the witness, first, upon the ground it is hearsay, and, secondly, on the ground it is a self-serving declaration.

The Court: That is the only way we can do it. Everything is hearsay here. Mr. Harwood White's testimony contained what his brother told him. Mrs. Oettinger in her deposition testified as to what instructions were given her.

Mr. Mullen: Very well, your Honor.

The Court: Ultimately, all is hearsay here. The poor man is dead. If he were here there would not be any lawsuit.

Mr. Mullen: I think that is correct, your Honor.

The Court: The objection is overruled.

Q. (By Mr. Kimmell): Was anything in the way of money collected from the people to whom you

(Testimony of Susan Crandall Kimmell.)

delivered these copies which you secured from Mrs. Oettinger?

A. Yes. These people each paid \$2.00, which was to cover merely the cost of material in the mimeographing. [121]

Q. Do you know Mrs. Terry Duce?

The Court: Did you turn that money over to Mrs. Oettinger or did you pay for the copies when you bought them?

The Witness: I didn't do either. I gave them Mrs. Oettinger's name and wrote her they were reliable people, and the transactions took place between them.

The Court: They were in the "movement," were they?

The Witness: Yes, that is right.

The Court: You know that expression?

The Witness: Yes, I do.

Q. (By Mr. Kimmell): Did Stewart Edward White ever discuss with you any arrangement which he had made with Mrs. Duce or any permission he had given to Mrs. Duce with reference to this "Gaelic Manuscript"?

A. I was present when the arrangement was made.

Q. What was the arrangement made and where, and when was it made, and who were present?

A. It was at Stewart White's home in Little Hill, Burlingame. Those present were Mrs. Duce, her daughter, Charmaine, and Don Stevens, a friend

(Testimony of Susan Crandall Kimmell.)
of Mrs. Duce, and myself, and Stewart White, of course.

Q. What was the arrangement which was made?

A. Exactly the same that was made with—I understand was made with Mrs. Oettinger. He told Mrs. Duce she might make some copies if she took extreme care as to the people [122] who received them. He charged her that this was not published, was not to be published, and must be protected. She agreed to do so.

Q. Did Stewart Edward White ever give you a bill of sale covering the “Gaelic” and other manuscripts? A. He did.

Q. He did? A. Yes.

Mr. Kimmell: Your Honor, through an inadvertence I left the original of this bill of sale in my office. I have photostatic copies, though.

The Court: I presume counsel, subject to any corrections, will stipulate to the correctness.

Mr. Mullen: I haven’t seen it, your Honor. I will be glad to accommodate Mr. Kimmell if it be signed. We can probably determine that right off the bat.

Q. (By Mr. Kimmell): I hand you a photostatic copy of a document bearing the title, “Bill of Sale.”

Whose signature does that bear?

A. The signature of Stewart Edward White.

Q. You know his writing so you know the signature? A. I do.

Q. It was acknowledged before whom?

(Testimony of Susan Crandall Kimmell.)

A. Before Willia N. Maguire.

Q. That bill of sale covers, among other things, the [123] "New Gaelic" and "The Old Gaelic" manuscripts? A. It does.

Mr. Kimmell: Your Honor, I offer this in evidence.

The Court: It may be received.

The Clerk: Defendant's Exhibit B in evidence.

(The document referred to was marked Defendant's Exhibit B and received in evidence.)

Q. (By Mr. Kimmell): Mrs. Kimmell, will you tell the court the circumstances and why this bill of sale was executed and delivered to you?

Mr. Mullen: I object to that, your Honor, as irrelevant, incompetent, and immaterial. She has the bill of sale. We are not contesting it. We concede the facts that are evident from the bill of sale, and the rest is immaterial.

The Court: Unless there is ambiguity I do not think the circumstances under which a contract is entered into are material.

Mr. Kimmell: Your Honor, maybe I can simplify this. People usually have reasons for executing and delivering documents.

The Court: She may state when it was delivered and the circumstances, but not as to explaining anything about it.

Mr. Kimmell: I don't want her to explain. I want her to testify as to when it was delivered——

The Court: Counsel conceded the genuineness of it, the [124] execution of it, from what he said.

(Testimony of Susan Crandall Kimmell.)

I think a question might be asked as to how she happened to be given the bill of sale.

Mr. Kimmell: That is my question.

The Court: That would call for the circumstances, but not for any reasons that might not be apparent from the bill itself.

Mr. Kimmell: I am a little awkward about this matter of examining. I appreciate the court's help.

The Court: You may answer.

Q. (By Mr. Kimmell): How did you happen to be given this bill of sale?

Mr. Mullen: For the purpose of the record, again, might I interpose the objection that it would be incompetent, irrelevant, and immaterial.

The Court: The objection is overruled, in view of the fact the defendant has sought by her answer a declaration as to proprietary rights. Such a declaration would not run only against the plaintiff, but anyone ever claiming it. I believe that question is proper. The objection is overruled.

You may answer.

The Witness: This bill of sale, as your Honor knows, was given to me in October, 1944, just two years prior to Stewart White's death, at a time when he was definitely preparing for his death and getting his affairs in order. [125]

He delivered to me all the manuscripts listed in the bill of sale at the time of the execution of this bill of sale, and particularly "Gaelic," because he felt that that was the only way in which it could be protected from being generally published or becom-

(Testimony of Susan Crandall Kimmell.)

ing public property, since it had not been published.

Mr. Mullen: At this point, your Honor——

The Court: That statement may be stricken.

Mr. Mullen: ——I move to strike that as being the opinion and conclusion of the witness.

The Court: That last paragraph may be stricken, particularly as to the “Gaelic Manuscript.”

Q. (By Mr. Kimmell): Then he gave you the bill of sale in anticipation of his death?

A. So he said, and those were the reasons he stated.

Q. He stated it was for the purpose of protecting the manuscript after his death?

A. He stated that.

Q. He wanted it to be in the hands of someone who would——

Mr. Mullen: I object to that as being leading and suggestive.

The Court: That is an argument. I will sustain the objection.

Mr. Kimmell: Very well. Let me try this question, your [126] Honor:

Q. (By Mr. Kimmell): He gave the bill of sale to you because he didn't want the manuscript in question to fall——

The Court: That is leading and suggestive. She has stated what he told her, and that is all. Leading questions are not permitted.

Mr. Kimmell: I am sorry, your Honor.

The Court: She is your witness.

(Testimony of Susan Crandall Kimmell.)

Q. (By Mr. Kimmell): How long have you known Harwood A. White, the plaintiff in this matter?

A. I believe I first met him around 1941 or '42.

Q. Was there any discussion between you and Stewart Edward White with reference to the connection of Harwood A. White with the work of Stewart Edward White in the field of metaphysics?

A. There was.

Q. What did Stewart Edward White say with reference to the connection of Harwood White with his work in this field?

A. He said that Harwood White had been anxious to publish "Gaelic" and he did not want him to get his hands on it, as he put it, and that it was—he didn't want him messing around with it. Those were his words.

Q. Did you ever receive a letter from Stewart Edward White in which he set forth his attitude toward his brother in this matter? [127]

A. I did.

Mr. Mullen: Your Honor, I will object to any further pursual of this line of interrogation upon the ground that the attitude of one brother toward another has no bearing——

The Court: Up to now it has been material to show that he did not intend to give any rights to the brother. But from now on the inquiry to show his attitude will not be material. For the purpose of this action the statement that has been made is relevant. Any further inquiry into the attitude

(Testimony of Susan Crandall Kimmell.)

toward the brother is not material to the subject here.

He did not claim a gift. As a matter of fact, the plaintiff here merely claims he had the same right as other people. He is not claiming any special right by reason of the relationship.

Mr. Mullen: That is correct, your Honor.

The Court: The statement that he did not want him to have it is enough. Many people endear themselves, after they are dead, to their relatives.

Mr. Kimmell: Then your Honor would not care to receive a letter setting forth Stewart Edward White's——

The Court: I have not looked at the letter. I did not know you were talking about a letter.

The Witness: Yes.

The Court: If there is a letter that has any bearing, that might show something concrete, yes. [128]

Q. (By Mr. Kimmell): I show you a type-written page bearing the words "Stewart Edward White" in the upper left-hand corner, and the words "Little Hill, Burlingame, Cal.," in the upper right-hand corner.

How is it signed? A. "SEW."

Q. Do you recognize the handwriting?

A. I do.

Q. Who signed that letter?

A. Stewart Edward White.

Q. That letter is dated October 26, 1944?

A. It is.

(Testimony of Susan Crandall Kimmell.)

Mr. Kimmell: I will offer it in evidence, your Honor.

Mr. Mullen: Just a minute. Before the offer is completed, your Honor, I would like an opportunity to examine the contents, if I might, please.

The Court: Yes.

Mr. Mullen: I believe, your Honor, after examination of the letter, that it bears again upon the proposition of the attitude of the brother, apparently bearing upon certain comments that Mrs. Kimmell would make.

I submit, your Honor, the contents of the letter would be incompetent, irrelevant, and immaterial, and not going to the subject of publication.

The Court: I will have to look at it and [129] see.

Mr. Mullen: Your Honor, I may say that "Beese" is Harwood White's nickname.

The Court: I think this letter is material. There is a paragraph there that is very important, which shows his desire to retain full rights to "Gaelic."

The sentence beginning, "The important point is that now I see that I have no right to let you in for what might be a disagreeable situation. The sort of squabble that just might arise if, after I die, he should rise and howl and attempt to do his own Gaelic, and show active resentment about an 'outsider,' " and so forth, is important. I believe this has bearing on the subject here. What weight to be given it is a question to be determined later.

The objection is overruled. It may be received.

(Testimony of Susan Crandall Kimmell.)

The Clerk: Defendant's Exhibit C in evidence.

(The document referred to was marked Defendant's Exhibit C and received in evidence.)

The Court: It shows an attempt to express proprietary rights over "Gaelic," that is, a manuscript, its contents and ideas.

As we are here dealing with the question as to whether he took it into public domain, that has a bearing, especially as the man is dead.

Anything that was undisputedly written by him, that might throw light on his relation to the manuscript, has some [130] bearing.

Q. (By Mr. Kimmell): Mrs. Kimmell, does that letter bear a stenographer's identifying symbol?

A. It does not.

Q. Mrs. Kimmell, what do you intend to do with the "Gaelic Manuscript"?

Mr. Mullen: I object to that as being incompetent, irrelevant, and immaterial.

The Court: I think you yourself have alleged that in the complaint, the reason you want the rights. You want your rights protected because you claim she intends to use it herself and you want her——

Mr. Mullen: Our allegation is that Mr. Harwood White wishes to write a book at this time, and Mrs. Kimmell will claim and does claim any use by him of the "Gaelic" material would be an infringement.

The Court: It is material. Furthermore, she asks that he be enjoined from claiming any right to it.

(Testimony of Susan Crandall Kimmell.)

Mr. Mullen: I will withdraw my objection.

The Court: Years ago I borrowed from someone, I have forgotten whom, an expression I used to use in school when I taught the subject of procedure and which I have used many times since, because "declaratory judgment" has been one of my favorite topics that I have written many articles on, both in the state court and the federal court. I used to use the [131] expression that "The beauty of this is that it turns law into a service station, rather than a repair shop." In other words, you can adjudicate rights before any harm is done by anyone.

Mr. Mullen: May your definition be used, your Honor, without infringing? It is a very apt definition.

The Court: I think I borrowed it from someone.

What is your intention to do with the manuscript?

The Witness: Nothing but guard it. I am not allowed to publish it, through Stewart Edward White's instructions.

The only part he wants published is that part that appears in "The Job of Living," which he wrote before he died.

The Court: I know that there was some French writer that left instructions not to publish manuscripts for so many years after his death. He forbade the publication at all during that time.

The Witness: Before he died, your Honor, he had written this manuscript which was later published as "The Job of Living," that contained, as

(Testimony of Susan Crandall Kimmell.)

Harwood White said this morning, that portion of the material that refers to living. The part of the material that refers to cosmology he felt was not ready for publication.

The Court: He does not want it published in that form?

The Witness: That is right.

The Court: I have not seen the bill of sale and I do not [132] know what it says. Go ahead.

Q. (By Mr. Kimmell): Mrs. Kimmell, Harwood White used the expression "distribution station" in his testimony this morning. Did you ever hear Stewart Edward White use that expression?

A. Yes, very often.

Q. What did he mean by the expression "distribution station"?

Mr. Mullen: Objected to unless the question is directed to what he stated in regard to his meaning.

The Court: That is right.

The Witness: He told me what he meant by "a distributing station" was a person who was interested in and well versed in this metaphysical philosophy, that could be of use to him in furtherance of the teachings, by talking to people who were interested and might have questions.

I might give an example of it in that various people who lived in my part of the State, for example, wrote to Mr. White——

Mr. Mullen: Just a minute. Is this what Mr. White——

(Testimony of Susan Crandall Kimmell.)

The Court: Unless he illustrated it that way——

The Witness: This is what happened to me.

The Court: You cannot tell that. What he told you to do is all right.

The Witness: What he said was that they might be of use [133] in talking with people who had questions to ask which could be answered better by conversation than by correspondence, but that it was in no way a dissemination of material over manuscripts.

The Court: I am not supposed to give you legal advice, but I will say this: This gives you the right to publish because it says so in so many words.

The Witness: Yes, that is right.

The Court: “* * * together with the right to publish or otherwise use said manuscripts in any way which she in her sole judgment shall determine.”

If you, in addition to that, chose to go by what he told you, that, of course, is a matter solely up to you.

The Witness: Yes.

The Court: Under this bill of sale the right to publish is given to you.

The Witness: That is true.

Mr. Mullen: I move to strike the portion of the witness' previous answer where she said he didn't want her to publish. She didn't, I believe, state anything with reference to a conversation, but rather an interpretation of an attitude. I think this should be connected up and a foundation laid.

(Testimony of Susan Crandall Kimmell.)

The Court: If that was a part of the conversation, it may remain. When that went in I had not read the bill of [134] sale.

I will say the bill of sale does give you the right to publish any of those.

Mr. Mullen: I didn't understand it was a conversation, your Honor, and perhaps we might have a foundation. If it was a conversation, I will withdraw my objection.

The Court: Is that a statement he made at the time this was executed?

The Witness: Yes, your Honor.

The Court: Then it may remain.

Q. (By Mr. Kimmell): Mrs. Kimmell, do you know of any copy or copies of this "Gaelic Manuscript" in public libraries in this State or anywhere else? A. No, I do not.

Q. Do you know of copies of this manuscript having been made available to the public in retail bookstores in this State or anywhere else?

A. No.

Q. Or in commercial lending libraries in this State or anywhere else? A. No.

Mr. Kimmell: That is all.

Cross-Examination

By Mr. Mullen:

Q. Mrs. Kimmell, I believe, if I am correct, you made [135] the statement you did not meet Stewart Edward White until the fall of 1941?

A. Until the summer of 1940.

(Testimony of Susan Crandall Kimmell.)

Q. As I understood you, you exchanged correspondence with him in 1940, but you never personally met him——

A. I met him in the summer of 1940. He came to visit us in 1940. I said I did not meet Harwood White until about 1941 or '42. It was Stewart I met in 1940.

Q. In the interim between the publication of "Gaelic" in 1933 and the time when you met Stewart White in 1940, you are not personally familiar with the various people and dealings that he had with the manuscript in that seven-year period, are you?

A. I am not. May I say, though, "Gaelic"—you said "the publication of 'Gaelic.'" "Gaelic" was never published.

The Court: The release——

The Witness: The mimeograph copies.

The Court: Let us say "disclosure," as we do in patent law.

Q. (By Mr. Mullen): You don't know the persons to whom the copies of "Gaelic" were sent in that period, who read it or exchanged it in that seven-year period?

A. I know some of them, and Mr. White told me about some of those people that received them.

Q. You don't purport, however, to represent, by any [136] sense of the word, you knew all the people to whom it was handed, or what their background or connection was, if any, with Stewart Edward White?

A. No.

(Testimony of Susan Crandall Kimmell.)

Q. You have no personal knowledge, do you, Mrs. Kimmell, as to what the cost of the making of copies was by Mrs. Oettinger? A. No.

Q. You don't know that they cost her \$2.00 flat and even, do you?

A. I don't know that they cost her \$2.00. I know about Mrs. Duce, who made the same copies.

Q. I am referring to Mrs. Oettinger.

A. No, I don't. I had no correspondence with her about it.

Q. When you stated that these friends of yours, to whom you gave Mrs. Oettinger's name, that sent Mrs. Oettinger \$2.00 for the copies, that was the cost, that is your judgment as to what——

A. That is my judgment, based on the fact that Stewart White, in his letter submitted as evidence, said she was to charge only the cost of reproduction. That would be a fair assumption then.

Q. You are not personally familiar with whether they cost her a dollar or a dollar and a half, or what? [137] A. No.

Q. You do know that copies were sold at \$2.00?

A. \$2.00 was paid for them.

Mr. Mullen: I think that is all.

The Court: Do you have any redirect examination?

Mr. Kimmell: I think not.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Kimmell: That is all.

We have the deposition of Mrs. Duce to be introduced. In connection with this deposition, your Honor, the title page says it is the deposition of Terry Duce. The name "Terry Duce" also appears on page 3 and also on page 1. She is referred to in the complaint here as "Mrs. Terry Duce." Terry Duce is her husband. May we have the record show that the name has been corrected to read "Mrs. Terry Duce"?

Mr. Mullen: I will stipulate the deposition that Mr. Kimmell is about to offer is that of Mrs. Terry Duce.

The Court: What is her given name?

Mrs. Kimmell: Ivy.

Mr. Kimmell: She states it in the deposition as "Ivy Oneita Duce."

The Court: It may be received and transcribed in the record in this case. [138]

The Clerk: Defendant's Exhibit D in evidence.

(The said deposition of Ivy Duce was marked Defendant's Exhibit D and received in evidence, and is in words and figures as follows:)

DEFENDANT'S EXHIBIT D

Be It Remembered, that on Tuesday, the 14th day of November, 1950, at 2:00 o'clock p.m., pursuant to written stipulation between counsel for the respective parties, at the Children's Hospital, 3700

Defendant's Exhibit D—(Continued)

California Street, San Francisco, California, personally appeared before me, John A. Theakston, a notary public in and for the City and County of San Francisco, State of California,

Ivy Duce, a witness called on behalf of the defendants.

Messrs. Schauer, Ryon & McMahon, represented by R. H. Shone, Esquire, appeared as attorneys for the plaintiff; and Leslie F. Kimmell, Esquire, represented by Tevis P. Martin, Esquire, appeared as attorney for the defendant, Susan C. Kimmell.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported by John A. Theakston, a duly qualified official reporter and a [139] disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Martin: Let the record show that Mr. Shone is appearing for Schauer, Ryon & McMahon, attor-

Defendant's Exhibit D—(Continued)

neys for the plaintiff; and Tevis P. Martin is appearing for Leslie F. Kimmell, Esquire, attorney for the defendant, Susan C. Kimmell.

And, Mr. Shone, will we have the usual stipulations?

Mr. Shone: All the usual stipulations. All objections are reserved, except as to the form of the questions, and so forth.

Mr. Martin: Thank you, sir.

IVY DUCE

being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Martin:

Q. Will you state your full name, please? [140]

A. Ivy Oneita Duce.

Q. And you are otherwise known as Mrs. Terry Duce?

A. Mrs. J. T. Duce.

Q. And where is your residence?

A. 33 West Sixty-seventh Street, New York City.

Q. And you are over the age of 21, are you not?

A. Yes.

Q. What is your occupation?

A. Housewife.

Q. Do you know the plaintiff, Harwood A. White?

A. I never saw him and I don't really know him,

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

but he called me on the telephone once; and so I wouldn't exactly say that was knowing him. I know of his existence. That's all.

Q. But you never met him personally?

A. Never met him personally that I ever recall.

Q. Do you know the defendant, Susan C. Kimmell?

A. Yes.

Q. How long have you known her?

A. I think since 1943.

Q. Where did you first meet her?

A. I could be wrong about that. It could have been——

Q. That is the best of your recollection?

A. That is the best of my recollection.

Q. Where did you first meet her? [141]

A. I met her at Stewart Edward White's home down in Hillsborough—or Burlingame, whichever one of those towns it is.

Q. Who was present at the time?

A. Mr. Don Stevens, who brought me down there, and my daughter Charmaine, and Mrs. Queenie Simpson. Mr. Stevens had driven the three of us down to see Mr. White.

Q. Do you know Stewart Edward White?

A. No. Wouldn't that be past tense? I did know him.

Q. Did you know him in his lifetime?

A. Yes.

Q. About how long did you know him?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Well, I knew him from that day, from 1943 until his death.

Q. When you say "that day" do you refer to the day that you went down there?

A. That was the first day I met him.

Q. At that time Susan Kimmell was present, along with Don Stevens and your daughter?

A. Yes.

Q. And I believe you stated you were taken down there by Mr. Stevens? A. Yes.

Q. Did your friendship with Stewart Edward White continue until his death? [142]

A. Yes.

Q. Did you and Mr. White have a common interest in metaphysical and philosophical matters?

A. Yes, very definitely. I was studying metaphysics at the time I met him, and I had wanted to meet him long before, and I didn't wish to approach him, because I felt that sometimes these writers and people of that sort are beset by a lot of frustrated old women, and I didn't want to be put in that category. It so happened that one night I spoke to Mr. Stevens about Mr. White's books, all of which I had read, and Mr. Stevens was so impressed with these books after he read them that he went down and got acquainted with Mr. White. And following that then he made the introduction for me to meet Mr. White.

Q. Had you commenced your studies of metaphysical things prior to——

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

A. Oh, yes, long before that.

Q. Did you on that occasion discuss metaphysical and philosophical matters with Mr. White?

A. Definitely. That's what I had gone there for.

Q. And did you at any other time on any other occasions discuss those matters with him?

A. Well, we had an interchange of letters, and they must be in my files at home. That particular night I said to him I was very interested in the poor material that was [143] taught children and I wondered if Betty had ever given any material for children. And one time he sent me some little paper which he said that he had been instructed to give me, which pertained to children. I think I had several letters from him. As to actual conversations, I am a bit blurry about it. It was during the war years and transportation was very difficult and I went back and forth between the east and the west, and I can't remember when I came back out here from my trip east. We heard that he was in the hospital, and my daughter went out and bought a lot of flowers and took these boxes of flowers over to visit him, and they wouldn't permit her to see him, because he was so ill, and it was, I assume, the beginning of his final illness. But we felt close enough to him to do that. That is all I can say.

Q. I take it, then, from your answer that you were definitely interested in Stewart Edward White's theories and beliefs?

A. Oh, yes.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Q. And you also had friends who were likewise interested in those things?

A. Oh, yes. There were several of us here in San Francisco studying along these lines, and it was our interest in these things that promoted my friendship with him.

Q. Now, Mrs. Duce, did you ever remember seeing a manuscript called the "Gaelic Manuscript" or "The Old Gaelic [144] Manuscript"?

A. Very definitely.

Q. When did you first see it?

A. I didn't see it at his house, but I learned about it at his house. We were talking about things and I asked him whether or not Betty had a—had given out material about children or other matters which had not yet seen print, and he said that he had other material, and I said, "Well, why haven't you printed it?" And he said that he had been instructed by Betty, or the "invisibles," as he often called them, that this was not the time to print such material because of the war, that if they were printed at that time the material they contained was apt to—as I remember it, he made an analogy between Jesus' parable of throwing the seed on the ground where it would not bear, and he thought a lot of it would be passed by in the fervor of war.

Q. When did you—

A. So then I asked him if I could—if there was any such material of Betty's that I could see, and he said—well, he went rummaging around the place

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

to find this Gaelic Manuscript, and he said that it seemed incredible, "but I am out of a copy myself." He said, "There is a lady up in Portland by the name of"—As I remember, it was Ottinger—Oterger—O-t-e— [145] something. And he said, "I have allowed her to have—to make a few copies of it for a few interested friends, and you can probably get a copy from her."

Q. Do I understand from what you have told us that this conversation took place on an occasion of your first visit? A. Yes.

Q. When you were accompanied by Mr. Stevens and your daughter? A. Yes.

Q. And it took place in Mr. White's home?

A. Yes.

Q. Now, am I correct in remembering that you said that this was about 1943?

A. I believe it to be that.

Q. And there were no other persons present at that time?

A. Well, there was this Mrs. Simpson and there was Mrs. Kimmell.

Q. I see. Now, I show you here a mimeographed document consisting of 156 pages, with a blue cover on it, on the cover of which it states "Return to Stewart Edward White, Burlingame, California," and the number "26" written in pen and ink on it. And I ask you if you recognize that document (handing document to witness)?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. (Examining document): Well, this document, this [146] particular document I don't believe I have seen before, but I have a copy of it.

Q. In other words, is that a copy of the Gaelic Manuscript? A. I believe it to be so, yes.

Q. Or otherwise known as the Old Gaelic Manuscript? A. Yes.

Q. Do you know of your own knowledge whether or not that is a complete copy of the Gaelic Manuscript?

A. Well, if I were in my home and I could get the original that I have—I have three copies of it in my house in New York—I could tell you, but it's been quite some time since I have been—since I have even looked at the thing, so I am afraid I can't be too specific about it.

Q. That manuscript deals with metaphysical and philosophical problems, does it not?

A. Yes, entirely.

Q. Now, did Mr. White ever give you permission to make copies of that manuscript?

A. Well, I just started explaining to you what happened. He told me I could write to this Mrs. Oettinger and get a copy from her, and I wrote to her and she informed me that she had no more copies, but that she had some stencils and that they were very badly worn, but that if [147] I wished to I could make some copies from those stencils. So then, as I remember it, I wrote to Mr. White and asked him about it, and he said to me that it was

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

perfectly all right for me to make a few copies, but they were to be limited and that I was only to allow a few of my close friends to see them, that I must be very careful, in fact, to whom I showed them, because since they had not been published anybody could, you might say, steal the material; and naturally I wanted to protect his manuscript from anything like that. So I had these two or three friends here who were studying like I was, and we sent up to the lady and she sent us the stencils. And I had no mimeograph machine, and a Mrs. Cuthbert had a mimeograph machine and she turned out, as well as I can remember, about ten copies. I know she had to remake or recut some of the stencils, they made such bad copies. And I have been trying since you informed me that you were coming over to remember exactly what happened to these copies. If you wish me to say that now——

Q. Yes. There were ten copies made.

A. I think that is the exact number. It might have been eleven.

Q. As near as you can remember?

A. As near as I can remember, there were ten.

Q. And what happened to them?

A. And I still have three of them. And, as I said, I [148] have not referred to them for years, because I myself went into the study of mysticism, which goes far beyond occult phenomena, and I have just very occasionally read a few paragraphs of it to some of my students who might be puzzled

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

about something. I have three copies, as well as I know, on my shelf, and Don Stevens received one and we sent one to Mr. Stewart White because he said he was out of copies at the moment. And I believe Mrs. Cuthbert got one and Mrs. Ahlstrand and Mrs. Simpson got one, and I think we sent one to Mrs. Oettinger. Now, it may be that I sent two to Mrs. Oettinger, or it might be that I sent two to Mr. White—I don't know. But of the outsiders—from those two people the only ones I can remember giving a copy were Mrs. Cuthbert and myself and Mrs. Ahlstrand, Queenie Simpson and Don Stevens.

Q. Now, those people who received copies were known to Mr. White, were they not?

A. I don't think that—I don't believe that he had met Mrs. Ahlstrand or Mrs. Cuthbert, but we had mentioned them to him. [149]

Q. What I mean by that——

A. He knew who they were.

Q. He knew who they were, and you had his permission to give them a copy? A. Oh, yes.

Q. In other words, it was not left to you to distribute to——

A. Oh, no, because he had adjured me to be very careful as to who saw it, because he didn't want this material to fall into the hands of unprincipled people.

Q. In other words, I take it that you were given very definite instructions that no one except selected

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

groups or individuals could peruse that matter or even see it? A. Very definitely.

Q. And that the copies could not be loaned out or put into the hands of any other persons, unless he approved it or you?

A. He didn't say that. He said that unless I myself knew that they were people who were definitely interested in this work and that they were people that I trusted completely, because of the fact that the material was to him quite sacred and he didn't want it used by anybody for any purpose. In other words, he didn't want somebody to publish it or use any portion of it.

(Unreported discussion.) [150]

Q. He relied on your judgment?

A. On my discretion.

Q. Your discretion? A. Yes.

Q. In other words——

A. See, I was a teacher and he knew that, so that was why he relied on my discretion.

Mr. Martin: Mr. Reporter, I would like to ask you to mark this manuscript for identification as Defendant's Exhibit A.

(The document referred to above was marked Defendant's Exhibit A and attached to the deposition of Mr. Don Stevens.)

Q. (By Mr. Martin): To your knowledge, Mrs. Duce, were any of those copies ever sold through retail outlets?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Of course not. The question of money might have arisen——

Q. We will come to that later. But I would like you to answer that.

A. Nothing that I ever had anything to do with was ever sold.

Q. Were any copies ever placed in a public or rental library?

A. None that I ever knew anything about or ever had anything to do with, nor any of these people that I speak of.

Q. In other words, none of those copies were offered [151] for sale by anybody? A. No.

Q. And they were never placed in general circulation? A. No.

Q. Were you at the time these copies were made engaged in selling books at retail? A. Me?

Q. Yes. A. No.

Q. Were you at that time operating a lending library? A. No.

Q. Or in any other type of business, except teaching of the metaphysical and such?

A. No.

Q. Now, a moment ago you spoke about some monetary consideration being involved, perhaps. Do you have reference to the cost of making those manuscripts? A. Exactly.

Q. Will you explain to us what the cost was and how that was had?

A. None of us had any money for setting up

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

something and paper was very scarce. Even carbon was scarce. And I said a while ago that Mrs. Cuthbert had a mimeograph machine. I don't remember now—it was so many years ago—whether she had it or whether she rented it, or what. But, at [152] any rate, when she got through with these copies—there are a great many pages of it, and our pages were much smaller than those—she arrived at a figure of something like two dollars to cover the exact cost of this carbon paper and the covers and the staples and putting the thing together, and that's what each of us paid. And another thing is that they, as it were, donated or gave Stewart Edward White and Mrs. "Oterger" a couple of copies, and their copies came out of this couple of dollars.

Q. There was no profit, in other words, made, no pecuniary profit made on it?

A. I can't imagine any.

Q. Are you familiar with a book, "The Job of Living," by Stewart Edward White?

A. Frankly, I have not read it and I never heard of it until just recently. I have not kept up with his work, because, as I said, my own field has gone into the realm of work which comes from India and I have sort of put this behind me. I read something about "Wings of—" —"Wings" something—the last one of his books I read.

Q. Did you ever have any conversation with Mr. White at any time about his desire to have the manuscript published or not published?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. Well, he seemed to be very cagey about it. At the time I spoke to him I was then rather new in these things and [153] I was—I felt very badly that here was all this material being bottled up, and so I asked him why he didn't publish it. And, as I remember, he said to me, "I only do things the way I am instructed." And I gathered by that he meant Betty, his wife, or the "invisibles," as he called them, and they didn't seem to think that was the time to do it. And I know he was very firm in his attitude that he would not publish anything, except as he was told to do it and except in such a manner as he was told to do it.

Q. You had no subsequent conversation with him about his ultimate wishes regarding that, did you, later? A. I can't seem to recall any.

Q. Now, one further question, Mrs. Duce. In your loan of this manuscript that you have, or copies of the Gaelic Manuscript, the restrictions and limitations as placed upon you by Mr. White were fully and faithfully carried out, were they not?

A. But definitely. I thought a great deal of Mr. White and I would naturally protect him in every way, and I was very appreciative that he should have permitted me to have the manuscript and trusted me with it.

Mr. Martin: That is all. Thank you.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Examination

By Mr. Shone:

Q. Mrs. Duce, do you teach at any recognized school? [154]

A. I do now, but I did not at that time.

Q. I see. Where do you teach now?

A. Well, I am the recognized head of the Sufi Order and I teach in New York and I have pupils in other parts of the country, including here.

Q. Is it classroom teaching, or is it by some other means?

A. I think you would consider it classroom teaching. We don't do correspondence course, if that's what you mean.

Q. In other words, it is by——

A. But I have—Mr. Stevens is now one of my teachers and he teaches here for me, and I have just come out on sort of an inspection trip for a couple of weeks. The order was here for thirty years before I ever got this position.

Q. What does that teaching comprise? What subjects?

A. Mysticism; not as Americans think of it, but as the people in India think of it. Americans think a mystic is somebody that talks to the fairies or to God, or something like that.

Q. What is the mysticism as you teach it?

A. The same thing as the Jewish people call Ein Soph or the Greeks call Sofia.

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Q. And previously you were in the field of metaphysics? [155] A. Yes.

Q. I understand that you received the first copy of this manuscript known as the Old Gaelic from Mrs. "Oterger" [Oettinger or Oettlinger] by mail, is that correct?

A. No, it isn't correct. I got the stencils from her.

Q. Yes, the stencils. And how did you receive them from her? A. By mail.

Q. From her home? A. Yes.

Q. Do I understand that Mr. Stewart Edward White told you that he objected to having the Old Gaelic Manuscript published during the fervor of war? Was that what you said?

A. He said that he would not have it published until he was instructed by Betty and the "invisibles" that he should do so, and that they had told them that that period during which it was under discussion with me was not the proper time, and that he probably would not—that it would probably not be done until after the war, if ever.

Q. Now, he objected, of course, from what you have told us, to the Old Gaelic being reproduced and published, but I take it he had no objection to its being reproduced in certain numbers in mimeographed form, is that right?

A. Well, I think that one can pose legal questions [156] that might lead to wrong answers. I think that he was very anxious that the meta-

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

physical knowledge which his wife—his wife's faculties gave in these manuscripts—should be given to those who were evolved enough or capable enough of understanding. He never attached any monetary interests to these things, because he told me that he never accepted a penny for the Unobstructed Universe since she had given it to him, and he wanted to be able to say that he believed it, and he felt he could not even say that if he had accepted money for it. He was extraordinarily ethical, and it was only—he had a love for people like myself who were interested and believed in these things, and he felt that a few of us might be permitted to share this knowledge, as long as it was not in the wrong hands, you might say. And he knew that we wouldn't get any money for it or use it for money, or anything like that.

Q. He was perfectly willing to rely upon your discretion, insofar as the distribution to your friends or acquaintances of this manuscript was concerned?

A. He was, except that I must make it clear that he never had any idea that there were going to be more than ten or a dozen of them at the most at any time. I mean I made that quite clear to him. It was not that I was the rest of my life to have the opportunity of spreading these manuscripts around. It was only that during this time when it had not yet [157] been published and when he didn't know whether it would ever be published or

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

not that I could share it with a few friends who had the same interest.

Q. Mrs. Duce, on this manuscript that Mr. Martin showed you a moment ago, marked Defendant's Exhibit A, I show it to you again (handing document to witness). Is that in the same form as the manuscript that you have at your home?

A. Well, as I told you, mine looks like that, but the pages are only about this long (indicating). They are regular manuscript pages, and I have not looked at the thing for quite a number of years. It looks to me exactly like it.

Mr. Shone: For the record, Mrs. Duce indicated that the pages were approximately three inches shorter, I believe, than the pages in this manuscript. Is that right?

A. We just made ours differently, that's all.

Q. The set-up, I mean—the physical set-up is different?

A. Yes, but we put them and bound them like that and we put a nice cover on them (indicating). That's the way they are now.

Q. Now, the copies that you have, were they made from this stencil that you received from Mrs. "Oterger"?

A. Yes.

Q. And does this appear to have been made from a different stencil or a different— [158]

A. I would not want to be pinned down on that, because it was too many years ago. We have been through a war and I have been back and forth over

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

the country and abroad and into India, and one thing and another, and I don't know.

Q. In any event, as I understand it, the manuscript that——

A. It would be my guess that it looked like that.

Q. About several inches shorter? A. Yes.

Q. And set up——

A. In other words, this is on what you would call legal script (indicating document), and mine was on regular typewriter bond.

Q. That is what I was getting at. Thank you. Did you ever have any correspondence with Mr. White in which he instructed you not to reproduce this manuscript in published form?

A. He didn't need to, because he had already discussed it with me.

Q. But you had no correspondence, then, along that line?

A. I don't know. I don't remember any correspondence, because we talked it over very carefully. He was a gentleman and ethical, and I was a lady and ethical, and there wasn't any need to impress that upon me because we never [159] considered such a thing. I don't believe there has been but only one student has looked at my manuscript for probably six years.

Q. That is partly because you have no further interest in it yourself, as you have told us, in that particular field?

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

A. No. They were packed away with my books, and when I moved to New York this time—after I came back from the Near East—they were put on a shelf there, along with the rest of my things, but I have not looked at them in a long time.

Q. Did you say something about Mr. White not wanting his manuscript stolen? Did you use that word?

A. I don't think he said that. What he inferred was that—after all, he had a great deal of subtlety and delicacy, and what he inferred was that since the material had not been published I must naturally be careful not to allow someone to have the manuscript who was not completely ethical and who would not take good care of it, because if they would not take good care of it somebody who was not ethical might choose to use some of the material on their own. It's been done before.

Mr. Shone: Thank you.

Mr. Martin: Just one more question.

Redirect Examination

By Mr. Martin:

Q. Do you know of any person besides yourself who has ever been given permission by Mr. White to [160] make copies?

A. Mrs. Oettinger or Oettlinger; he might have given Mrs. Oettinger the right.

Q. Do you know how many she made?

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

A. No, I don't know a thing about the woman. I never met her and I only had—this Mrs. Cuthbert and I had this little correspondence with her, and I didn't know anything had come up until—what is his name?—the brother?—Harwood?

Q. Harwood?

A. He telephoned me in New York a few months ago and told me that he was upset because it had not been published, and I said, "I guess it is very strange, because—" I don't think this should go into the machine, but my teacher who—my Sufi teacher here knew the Whites very well—

Mr. Shone: Is that what you told Mr. Harwood White?

A. No, no. I am simply saying that my teacher knew the Whites very well, and she told me that Mr. Harwood White was not as balanced in his thinking as Stewart. And so after he had telephoned me I began feeling a bit dubious and wondering what on earth was going on. And then I wrote a letter to Mrs. Kimmell, since she was the one I knew, and I said, "What is happening?" So [161] then she wrote me a letter and said that Mr. White was insisting on a suit, and that's the first I knew that this book, "The Job of Living," had been brought out, taken from the Gaelic manuscript.

Q. (By Mr. Martin): Now, in the complaint in this action Mr. Harwood A. White alleges that Stewart Edward White permitted one Mrs. Terry

Defendant's Exhibit D—(Continued)
(Deposition of Ivy Duce.)

Duce to reproduce, distribute and sell copies of said manuscript to her friends and acquaintances.

A. That is not correct.

Q. That is not correct?

A. He never gave me any permission to sell copies. What is he thinking of—his brother?

Q. All you did was have specific copies made with Mr. White's permission? A. Yes.

Q. And the cost of mimeographing and the paper, and such like, was contributed by a certain small group of people?

A. And the small sum we contributed we made large enough so that we could make the several extra copies to go to Mr. White and to Mrs. Oettinger.

Q. And no copies were ever sold or distributed freely as directed by him? A. How could we?

Q. (By Mr. Shone): Did you meet Mrs. Kimmell, Mrs. Susan Kimmell, the first time you went to Mr. White's home? [162]

A. Yes, yes. He introduced her to me there as his—I don't know—you might say his chosen and trusted companion—and I don't know whether—it seemed to me he said she was a cousin. I am not certain, but I know she was a very, very close person in his confidence, and that he trusted her very much, just by his attitude and by the things that they said.

Q. Did you see her at any time after that—Mrs. Kimmell?

Defendant's Exhibit D—(Continued)

(Deposition of Ivy Duce.)

A. No. I had no occasion to see her. I have been in the east since 1945 and—in fact, I went back east almost immediately after I had this conversation with Mr. White. I went back east and I came back here, and then I went back east and stayed from 1945 on; and I have been out here on a couple of small trips, but I haven't lived here since 1945.

Q. But, in any event, when Harwood White called you shortly thereafter——

A. That's the first time I ever heard of him. I mean ever had any contact with him. And then he sent me a long affidavit that he wanted me to fill out, and I didn't want to fill it out; I told him that if he had any problems he could have Dutton's—or Putnam's—or whoever it is in New York that does the publishing—to speak to me, because I didn't want to get embroiled in any suits over such foolish things.

Q. But, in any event, after Mr. White did call you [163] you called Mrs. Kimmell, is that correct?

A. No. I wrote her a letter and I asked her—I said, "Sufis believe that there is always two sides to every question. Just what is going on?" And she wrote me back and said that this man was insisting that this was a published manuscript, and therefore he had the rights to it, and I have every conviction this is untrue.

Mr. Shone: That is all.

Mr. Martin: No further questions.

/s/ IVY ONEITA DUCE.

Mr. Kimmell: Now, Mr. Clerk, there were no exhibits in connection with this particular deposition, were there?

The Clerk: That I do not know, sir. There are some extra exhibits that I did not identify.

Mr. Kimmell: I also offer in evidence the deposition of Don Stevens.

The Court: The deposition of Don Stevens will be received and transcribed in any record that is prepared in this case.

The Clerk: Defendant's Exhibit E in evidence.

(The said deposition of Don E. Stevens was marked Defendant's Exhibit E and received in evidence, and is in words and figures as [164] follows:)

DEFENDANT'S EXHIBIT E

Be It Remembered, that on Friday, the 10th day of November, 1950, at 4:00 o'clock p.m., pursuant to Stipulation re Depositions, hereto annexed, at the offices of Hart & Hart, Suite 715, Chancery Building, 564 Market Street, San Francisco, California, personally appeared before me, N. S. Stoll, a notary public in and for the City and County of San Francisco, State of California, Don E. Stevens, a witness called and examined by the defendant Susan C. Kimmell.

Messrs. Schauer, Ryon & McMahon, represented by R. H. Shone, Esquire, appeared as attorneys for the plaintiff; and

Leslie F. Kimmell, Esquire, represented by Tevis

Defendant's Exhibit E—(Continued)

P. Martin, Esquire, appeared as attorney for the defendant Susan C. Kimmell.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the deposition be recorded by Harvey D. Prather, a duly qualified official reporter and a disinterested person, and thereafter transcribed by him into typewriting, to be read to or by the said witness, who, after [165] making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the notary public, it shall be deemed that the notary public has so instructed the witness to answer, but that he still refuses to answer.

Mr. Martin: May we have the usual stipulations, Mr. Shone?

Defendant's Exhibit E—(Continued)

Mr. Shone: Yes, all the stipulations; they are all reserved.

Mr. Martin: All objections are reserved except as to the form of the question. And stipulated the notary may be excused?

Mr. Shone: Yes.

Mr. Martin: And should the witness be advised not to answer the question it is deemed he has been instructed to answer by the notary, and so forth?

Mr. Shone: Yes, that is understood, of course.

DON E. STEVENS

being first duly cautioned and sworn by the notary public to [166] tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Martin:

Q. What is your full name, please?

A. Including the middle initial—I mean the middle name?

Q. Yes. A. Don Eugene Stevens.

Q. And where do you reside, Mr. Stevens?

A. Rural Route 1, Box 819, Mill Valley.

Q. And your occupation?

A. I am assistant to the vice-president in charge of manufacturing and research of the Stan-Cal Asphalt & Bituminous Company.

Q. Do you know Harwood A. White?

A. I believe that I have never met him.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Do you know Susan C. Kimmell, one of the defendants in this action? A. I do.

Q. Did you know Stewart Edward White in his lifetime? A. Yes.

Q. When did you first meet him?

A. During the winter of 1942 to 1943.

Q. What were the circumstances under which you met him?

A. I had read a book of Mr. White's which interested [167] me very much, and so with a wild idea that I might possibly be able to meet him, I sent him a letter asking if there would be any possibility of discussing some of the contents of the book with him, and perhaps after a day or two at most I had a very prompt reply from him, saying he would be very happy to discuss any matters he had in the book and I only needed call him on the telephone and we would have a mutual appointment, and I did so, and perhaps a week or two later met Mr. White and discussed these things that had interested me.

Q. Where did that take place?

A. At Mr. White's home.

Q. Were there any other persons present?

A. There was his man, who had been with him quite some years at that time, who let me into the house, who did the same on several occasions after that.

Q. Did your acquaintanceship with Stewart Edward White continue until his death?

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

A. It did.

Q. Did you visit at his home frequently?

A. Very frequently; I was just a few miles from him, as a matter of fact.

Q. At that time you lived where?

A. He lived in Hillsborough and I lived at South San Francisco. [168]

Q. During the course of your visits to his home did you have any opportunity to read his unpublished manuscripts?

A. On various occasions he would quote passages from certain of his unpublished manuscripts to illustrate a point to me. I don't know those particular ones, but after I had known him for six months to a year he felt there was certain material which was contained in a manuscript which he called the Gaelic papers, which he would lend to me, provided I would take very careful care of it and not allow it out of my own hands—at least without checking with him.

Q. When you say the Gaelic papers, that is known as the Gaelic manuscript, or the old Gaelic manuscript? A. That is correct.

Q. In other words, they are synonymous, all the same manuscript? A. Exactly, yes.

Q. He said you couldn't loan them to anybody else without his express permission?

A. That was a very meticulous point he made.

Q. And he insisted upon that without reservation at all times? A. That is very true.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Did you borrow the manuscript on several occasions?

A. I borrowed it, I believe, on two occasions; first, to read it myself, and on one occasion to lend it to a friend. [169] I believe on that occasion it was Mrs. James Terry Duce to whom I lent it; it interested her very much, the manuscript.

Q. I show you herewith a bound—well, it is a brown manila folder in which is enclosed a mimeographed booklet, let us call it, with blue cover, and ask you if you can identify that material?

A. This was the Gaelic manuscript; I know that of my own knowledge.

Q. Do you know of your own knowledge whether or not that is a full and complete copy of the Gaelic manuscript?

A. I wouldn't know unless I went through it entirely, but the table of contents are identical with the one that I had borrowed on that occasion.

Q. During the course of your friendship with Stewart Edward White, did you have any talks with him regarding publication of this Gaelic manuscript?

A. Very often; as a matter of fact, after I had read the Gaelic manuscript I told him I thought that was the most valuable material which I had seen of his. I had read his various published books at that time, and his Gaelic manuscript was of such great interest to me I said I thought it was very, very important it be published also. Mr. White told me at that time that he had been instructed by what

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

he called the invisibles not to publish the Gaelic manuscript until he had further instructions from them. As a consequence I would [170] frequently ask him, "Well, what do the invisibles say about the Gaelic manuscript now?" And he would always say, "Well, it's not to be published," and eventually he read me a quote from a book he had published at that time, and said this book was to contain certain material in the Gaelic manuscript, and that pleased me because I was happy that certainly the Gaelic manuscript was to become published too. I had a little fear in the back of mind and I said, "Is this all the material of the Gaelic that will be published?" and he said, "Yes, this is all that will be published."

Q. Where did those conversations take place?

A. At his home.

Q. Were there any other persons present?

A. Not this last conversation when he said it was all of the Gaelic manuscript to be published.

Q. Can you recollect for us, sir, the approximate date that that conversation took place?

A. That was not too terribly long before he was taken ill and died. As a matter of fact, I would say it couldn't have been more than a year previous to his death, perhaps a year and a half, to the most.

Q. Was there any other person present when you discussed publication of this manuscript with Mr. White?

A. Not this final discussion. I believe on one

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

previous occasion when Mrs. Duce, a friend of mine who was also [171] interested in the Gaelic manuscript, when she had accompanied me to the home also, inquired of him about the publication, and had been informed that the invisibles said it was not to be published yet.

Q. And then in the course of your previous answer you mentioned a book that Mr. White stated to you certain excerpts from the Gaelic manuscript were going to be published in? A. Yes.

Q. Do you remember what the title of that book was?

A. He originally, as I recall, titled it "The Job," and then later on said "The Job" had been renamed and apparently had been called "The Job of Living."

Q. Have you ever seen this book called "The Job of Living"? A. Yes, I have.

Q. Have you read that book?

A. I have read portions of it.

Q. Have you checked the book to see how much excerpts from the Gaelic manuscript are contained in it?

A. To my way of thinking there is a great deal of important material in the Gaelic manuscript which is not included in "The Job of Living."

Q. So in the book, "The Job of Living," there are only small portions, comparatively, of the original Gaelic [172] manuscript, as you know it?

A. That is entirely correct.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. And those are the portions which Mr. White told you were the only parts he ever wanted published? A. That is exactly correct.

Q. That is correct? A. Yes.

Mr. Martin: Mr. Shone, may we ask the reporter to mark this manuscript on the cover as "Defendant's Exhibit A for identification," and "The Job of Living" as "Defendant's Exhibit B for identification"?

Mr. Shone: Yes.

(Manuscript marked "Defendants' Exhibit A for identification," and book entitled "The Job of Living," marked "Defendant's Exhibit B for identification.")

The Witness: May I offer this, possibly, as a way of clarification, I do not know whether it had been White's original intention to call this particular book "The Job," or whether that was his abbreviation and called it "The Job of Living." He always called it "The Job" when he talked with me.

Q. (By Mr. Martin): Now, I take it from your answer you know Ivy O. Duce? A. Yes.

Q. She is also known as Mrs. Terry Duce, is that [173] correct?

A. Mrs. James Terry Duce.

Q. Did you introduce Mrs. Duce to Mr. White?

A. Yes, I was the one to introduce her.

Q. Where did that introduction take place?

A. At Mr. White's home also.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Were there any other persons besides yourself and Mr. White and Mrs. Duce?

A. That is rather difficult to answer. I am quite certain her daughter was there, and there may have been one other person on that occasion.

Q. Can you give us the approximate date of that introduction? A. That I couldn't.

Q. Have you any general idea of any approximate time?

A. If I were guessing I would say probably in around 1944.

Q. Were you present when Mrs. Duce asked permission to make copies of the Gaelic manuscript?

A. It's very difficult to bring back a lot of the small details of that period. I believe—my present recollection is that on this occasion Mrs. Duce inquired of Mr. White in further detail regarding the publication of the Gaelic manuscript, and was told by him that he still did not have his instructions to publish it from the invisibles, as [174] we previously discussed. But going on further, I believe it was also at this first introduction that Mr. White suggested that there had been a set of mimeographed stencils made, and she might be able to obtain a set to make a reproduction for herself. He questioned her at that time in a manner similarly as he had done me in the past.

Q. What do you mean by "he questioned her"? Will you explain that?

A. Well, that boils down to this: Mr. White's

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

sincere feeling that material of value to a certain progress should be made available to other persons who were capable of absorbing and assimilating it. At the same time he had no compunction of letting it be lent by himself or some one under his careful control, to another party, but he was very, very definite, adamant on the point that until he had positive instructions from the invisibles that it was to run no chances of getting out to the general public.

Q. Can you identify the manuscript which I have heretofore shown you as one compiled from those stencils to which Mr. White referred?

A. They are the same. I have had both types of copies, one original lent to me by Mr. White, and also those from the stencils which Mrs. Duce borrowed, and they are the same manuscript.

Q. Can you say whether or not the manuscript or [175] mimeographed copy of it Mrs. Duce made from the stencils is a complete copy of the manuscript?

A. That I know in considerable detail, because there is considerable complication; there were at least four or five pages missing in toto from the copies which she made.

Q. Do you know, Mr. Stevens, the number of copies which were made by Mrs. Duce?

A. To the best of my recollection, which I must be guided by, it's my belief it was in the neighborhood of ten.

Q. Do you know what happened to those copies?

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

A. One was given to me; there were at least two or three which were given back to Mr. White; Mrs. Duce I know retained one. I believe one or possibly two were given to a woman who had originally made the stencils, and I believe that one or two went to a couple of Mrs. Duce's and my friends here in San Francisco.

Q. Were those persons who obtained those copies persons that Mr. White had authorized to have copies of that manuscript?

A. They were persons whom Mrs. Duce and I assured him fell under the category of individuals who were entirely reliable, who would profit by the use personally of the reading of the manuscript, and who could be relied upon not to disseminate it.

Q. In other words, he knew at the time to whom those [176] manuscripts were going and permitted that only on your recommendation that they were fit and proper persons?

A. I think that would be a little bit more extreme than was actually the case. Mr. White had known myself for quite a considerable time and trusted my statement that they would not go to any one who was not entirely reliable. However, I do say this, that those persons in San Francisco who got copies, one of them was known to Mr. White—had been introduced to him, and they had had an extended conversation—very pleasant friendship. The other one in San Francisco to whom a copy was to go, to the best of my recollection, had not met Mr. White.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. Now, was there any specific stipulation in regard to the number of copies that could be produced?

A. These things are never arranged with a meticulous, precise, predetermination of all details. I think if I said "Yes," it would give a wrong impression. If I said "No" it would give a wrong impression. Mr. White did not specifically state there were to be eight and no more than eight, and on the other hand the entire agreement, the ethical agreement between Mr. White and myself and Mrs. Duce was there was to be a very small, limited number of copies, and he would trust her to handle it with discretion.

Q. When you say "trust her to handle it with discretion," do you have reference to the persons to whom those [177] copies were to be loaned or presented?

A. I would, very definitely.

Q. Can you tell us, if you know, Mr. White's reasons for those restrictions?

A. It's a very, very simple question. He had had specific instructions, he stated many times, that he was not to publish this manuscript until he had instructions to do so from the invisibles, and he abided by that doctrine constantly.

Q. And I believe you told us the only part he wanted of this manuscript published appeared in the book, "The Job of Living"?

A. That was the final statement to me on the subject, and I never queried him again after that

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

point, because it was a closed matter as far as I was concerned.

Q. And all the mimeographed copies, as I have shown you there as Defendant's Exhibit A for identification, were fully and completely controlled by his restriction placed upon you and Mrs. Duce?

A. As a matter of fact, we went to the extent of putting a flyleaf or page in Mrs. Duce's copy that this was specifically property of Stewart Edward White and there was to be no further duplication from these copies.

Q. Do you know of your own knowledge whether or not any of those copies were ever sold? [178]

A. Again that's a type of question where my only feeling is it is ridiculous to say "Yes" or "No." The people to whom those copies were given were persons that I know personally would never part with them for monetary consideration.

Q. I see your point, Mr. Stevens. Do you have any knowledge of Mrs. Duce ever selling those copies at retail or through retail outlets?

A. I know very definitely she did not, and would not consider it.

Q. Do you know whether or not she ever placed them in a lending library, or anything of that sort?

A. That was entirely against the restrictions Mr. White placed on the matter, and I know she would not do it and did not do it.

Mr. Martin: Thank you, that is all.

You may cross-examine.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Cross-Examination

By Mr. Shone:

Q. Mr. Stevens, this last matter, I presume you base your opinion as to what Mrs. Duce would or would not do with these manuscripts on some personal knowledge you have of her mentality?

A. Not only her mentality, but we study along different lines together, and I know of her adherence to her word.

Q. That is what you base that conclusion on?

A. Entirely. [179]

Q. Did you say you thought she had produced about ten copies? A. In that neighborhood.

Q. And upon what do you base that conclusion?

A. There are very many conversations I had with Mrs. Duce at the time and also these later conversations I had with her when we were trying to complete the actual details that went on.

Q. And that was for the purpose of testifying, was it, in this lawsuit?

A. Not originally. We understood that Mr. Harwood White intended to try to gain control of the Gaelic manuscript, and I was on the east coast at that particular time, so we knew nothing at all about the lawsuit, that we might be called up to testify in at that point, but we were trying for the best of our own conscience sake to reconstruct just exactly how the whole picture had fitted together originally.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. So you went over and discussed these various matters and various dealings?

A. I did not discuss with Mrs. Duce my personal contacts with Mr. White, but only discussed with her the reproduction of the manuscript.

Q. In other words, the number that had been produced and to whom they had been delivered or sold, as the case might have been? [180]

A. That's right, and incidentally we shouldn't say they were sold to any one.

Q. In other words, as I understand your testimony, none of these manuscripts were ever sold to any one, they were given to them, is that right?

A. There was a purse made up of funds to repay the person who had gotten the stencils together, had paid the postage on them, and bought the paper, and they had actually rented a machine, as I recall, and run them off, so the various ones of us had to chip in the approximate amount which had been entailed in making these copies, and if that could be conceived as being a sale, I think it would be stretching the term considerably.

Q. How much money was spent for that purpose?

A. Each of us paid approximately two dollars to the duplicator for our copy, which would indicate that there was somewhere between twenty and twenty-five dollars collected in this fund, and I believe that is correct.

Defendant's Exhibit E—(Continued)
(Deposition of Don E. Stevens.)

Q. In other words, there were about ten or twelve persons that contributed, is that it?

A. No, as a matter of fact there wasn't even that much money, because at least two or three of these copies were retained to White, gratis, and as I recall, there were two or three copies returned to the lady in Eureka, or wherever it was; I don't know who she was; and that would [181] have left in the neighborhood of five copies, so that would have meant the entire sum put into the purse would amount to ten dollars at most. I believe also the lady who duplicated them was given her copy without any financial contribution because of her efforts. So perhaps eight dollars would have been the approximate amount of money.

Q. I see. In other words, you and Mrs. Duce and possibly two other persons paid the cost?

A. That is entirely correct.

Q. And then these other people whom you have named received one or more copies for the reasons you have given? A. That's right.

Q. Now, I also recollect you to have said that Mr. White did not in advance of the time the people received this manuscript know the actual persons who were going to receive them, but relied upon yourself and Mrs. Duce and anybody else you and she permitted deliveries of the transcript to, is that correct?

A. I am not trying to withhold any information, but those are details that are impossible for me to

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

remember specifically. I do recollect the only other two persons in San Francisco who received copies, one of them was known to Mr. Duce, and I believe the other one had not met him at that time.

Mr. Martin: Pardon me, did you mean Mr. Duce or Mr. [182] White?

A. Mr. White, excuse me.

Q. (By Mr. Shone): As I recall, however, you said in direct examination that the manuscripts were delivered or distributed by either yourself or Mrs. Duce to persons whose names may not have been and actually were not known to Mr. White in advance of the distribution, but that Mr. White relied upon you and Mrs. Duce, as the case may have been, and your background and understanding, and had the confidence in you to allow you to distribute them to persons who he would be satisfied with, wasn't that your testimony?

A. That was the general course of events.

Q. Now, so far as you know, there were only two other persons in San Francisco besides yourself and Mrs. Duce to whom these manuscripts were given, is that correct?

A. That is correct; that is the best of my recollection.

Q. Do you know how many people Mrs. Duce may have given manuscripts to?

A. That is the entire number that I am speaking of now. I gave none to any party; Mrs. Duce, as I recall, gave out two to persons in San Francisco,

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

and that is the entire amount that were passed out.

Q. So far as you know? A. Yes. [183]

Q. Now, do you know a Mrs. Otteringer?

A. The name is familiar, but I don't know that I do; I don't connect it.

Q. Mrs. Margaret Otteringer, I believe, of Palo Alto, if that refreshes your recollection?

A. Not a bit.

Q. You have never heard that Mrs. Otteringer reproduced or distributed any of these manuscripts?

A. I have no recollection of that. I just know nothing about all that; I may have at one time, but I certainly don't at this point. That could conceivably, though, be the name of the lady—did she perhaps move from Palo Alto to Eureka, or somewhere north, and was she the one from whom the stencils were borrowed?

Q. I am not familiar with that, and can't say.

A. If that is true, if that is she, then I did know that Mrs. Otteringer had made stencils, but I wouldn't know the number of copies she made or the disposition.

Q. You only know of one occasion when stencils were made, is that correct?

A. That is entirely correct.

Q. Now, do you know who retained possession of the stencils?

A. Those stencils were sent back to the originator.

Q. Who was that? [184]

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

A. I don't know the name.

Q. Who do you mean by "the originator"?

A. Whoever originally made the stencils.

Q. And you don't know who that was?

A. If it was this Mrs. Otteringer that moved from Palo Alto up north, then that was she.

Q. Who was the person who did make them?

A. I recall that was a Mrs. Cuthbert, in San Francisco.

Q. And was she also a person interested in this same field of metaphysics?

A. To a degree, at the time that Mrs. Duce was was here. She was not as deeply interested as Mrs. Duce, but to a certain degree on that point.

Q. Did you ever have any contact with her afterwards?

A. On occasions I have been at her home.

Q. Is she a person interested in that field today?

A. I have not seen Mrs. Cuthbert for perhaps two or three years, and the last time I saw her I believe she was primarily concerned with her relationship to the Episcopalian church.

Q. Did you say a moment ago—I don't recall where Miss Cuthbert resided. In San Francisco?

A. That's correct.

Q. Do you know the address?

A. I don't, not now. [185]

Q. Now, this manuscript that was first given to you of the Gaelic by Mr. White, was that in the

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

same form as this Defendants' Exhibit A that was just shown to you?

A. It had a blue cover, that I definitely recall. I do not think that it was mimeographed, but I believe that it was actually all stenciled as the index is here.

Q. In other words, the index appears to be a replica, would that be correct?

A. That's right. This is a larger size paper than the one which White originally lent to me.

Q. So that apparently is different, in so far as the physical makeup is concerned, than the manuscript he gave to you?

A. Let's put it this way, this is not identical as far as paper size is concerned.

Q. What about the type of print, and that sort of thing, is it similar?

A. Due to the fact I have handled the two different types of copy, I don't know if this resembles, which this one resembles so far as type is concerned.

Q. In other words, you don't know if that is the one made from the stencil or is similar to the one Mr. White gave to you originally, is that right?

A. It's just too hard to recollect now.

Q. You just don't recollect? [186]

A. That's right. I judge it entirely by the subject matter content.

Q. But your recollection is this one is different in paper size, is that correct?

A. That is my recollection.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

Q. Do I also recollect—I don't want to be repetitious, but I want to be sure—I understood you correctly, did I, I also recollect you testified the total number of these mimeographs made from the stencil were about ten? A. Approximately.

Q. Were there any other copies other than those mimeographed that Mr. White would have in his home, that he would give to persons such as yourself?

A. No, as a matter of fact the copy which Mr. White lent to me at that particular time, he said that he very, very definitely must be sure to have back, as it was his only copy.

Q. How did you first become acquainted with this present lawsuit, Mr. Stevens?

A. I can't recall whether it was by direct communication from Mrs. Kimmell saying there was to be a lawsuit and what did I remember of the case, or whether I was in New York at the time Mrs. Duce received her letter from Mrs. Kimmell.

Q. Do you know the names of any other persons other than those who have been mentioned here who have had copies [187] of this old Gaelic manuscript?

A. Do you mean for their own personal possession, or to read?

Q. Regardless of the purpose, either to read or to distribute.

Mr. Martin: If you know.

A. I have lent my copy to two persons that I can recollect, and got it back from them.

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

• Q. (By Mr. Shone): Do you know of any other people?

A. No, I don't recollect any others. I have not lent it to many people because I felt that it should be only a very, very restricted number of people who should be allowed to read it, particularly in view of Mr. White's final statement on it. Despite the fact that I think a great many people would profit by it tremendously, I respect his final instructions on it.

Would it be in order for me to offer a few comments of my own?

Mr. Shone: I don't think that is for either of us to suggest. I mean, there is a regular procedure of asking and answering questions here.

I have no further questions, Mr. Martin.

Redirect Examination

By Mr. Martin:

Q. There is just one question I may ask. In any of the lendings that you made you were careful [188] to conform to restrictions that Mr. White placed upon you when he permitted you to have possession of this manuscript?

A. I always made a very definite point with regard to persons to whom I lent it, that it was not to go out of their home.

Q. And that it should be returned to you?

A. That it should be returned to me.

Q. And you were very careful about the qualifications and interests of these people whom it would

Defendant's Exhibit E—(Continued)

(Deposition of Don E. Stevens.)

do them some benefit, in accordance with Mr. White's instructions?

A. That was not only Mr. White's instructions to me, which I felt obligated to carry out, but was in conformity with my convictions and any teachings I may have had.

Q. And you did carry out his instructions entirely? A. Yes.

Mr. Martin: I think that is all.

Recross-Examination

By Mr. Shone:

Q. Incidentally, this lady who did the duplicating work, was she given her copy by you directly or by Mr. White?

A. She was not given a copy for duplicating. The stencils were sent to Mrs. Duce, and Mrs. Duce asked this particular friend of hers if she would actually do the mimeograph work on the stencils.

Q. I understood you said before for the work done, [189] this work, you allowed her to keep a copy, is that your testimony?

A. I believe that is true.

Q. Who was the person that allowed her to keep the copy, you or Mrs. Duce?

A. That would have been Mrs. Duce; I had nothing to do with it. I received a copy from Mr. White and Mrs. Duce did that.

Q. And Mrs. Duce was the one who handled

this mimeograph work? A. Yes.

Mr. Shone: That is all.

Mr. Martin: All right, thank you very much.

/s/ DON E. STEVENS.

The Court: Gentlemen, does that conclude your case?

Mr. Kimmell: That concludes my case.

The Court: Do you have any rebuttal, Mr. Mullen?

Mr. Mullen: Just a moment, please, your Honor.

The Court: I thought perhaps if we take a recess, you gentlemen, both being from out of town, and giving me about 15 minutes to read the depositions, that then we can come back and I can hear any argument you wish to present, or any additional testimony.

Mr. Kimmell: You Honor, in connection with the [190] deposition of Don Stevens, there is the manuscript which Mrs. Kimmell——

The Court: That is already in. We took it away from her.

Mrs. Kimmell: No.

The Court: We will put that in. She merely identified it.

The Clerk: That is Defendant's Exhibit F in evidence.

(The document referred to was marked Defendant's Exhibit F and received in evidence.)

Mr. Kimmell: Then also the book, "The Job of Living."

The Court: You are making a very big record, gentlemen. I do not see what the materiality of the book is.

Mr. Kimmell: It is not necessary, your Honor.

The Court: I do not see any need for it.

Mr. Mullen, can you see the need for encumbering the record by giving——

Mr. Mullen: Our complaint concedes certain portions of "The Gaelic Manuscript" as appearing in this "The Job of Living." I find no purpose, that I can see, that the copy would serve, in admitting it. However, I have no objection to it if Mr. Kimmell wishes to offer it.

Mr. Kimmell: I don't think it is necessary, your Honor.

The Court: I do not think it is material.

Mrs. Kimmell: I would rather not put it in, myself. [191]

The Court: No one has gone through, to point out what portions appear here. This is protected by copyright by Dutton, Mrs. Kimmell, and Dutton as the publisher.

I think, however, this will bear upon the point that "Gaelic" was the personality through whom these ideas were expressed, and this book will show what was Mr. White's own comments with the message received from "Gaelic." I think we had better receive it.

The Clerk: That is Defendant's Exhibit G in evidence.

(The book referred to was marked Defendant's Exhibit G and received in evidence.)

The Court: Do you wish to put on any rebuttal, Mr. Mullen?

Mr. Mullen: I think not, your Honor.

The Court: Gentlemen, we will take a recess. These depositions are very short. I can read them very rapidly. Then I will return and hear any comment you wish to make.

(Short recess taken.)

The Court: Let the record show that during the recess the court has read the depositions of Don Stevens and Ivy Oneita Duce.

I will hear any argument you care to present.

(Opening argument was made on behalf of the plaintiff by Mr. Mullen.)

(Argument was made on behalf of the defendant Susan C. [192] Kimmell by Mr. Kimmell.)

(The closing argument was made on behalf of the plaintiff by Mr. Mullen.) [193]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 25th day of January, A.D. 1951.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed January 31, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49, inclusive, contain Complaint for Declaratory Judgment in Respect to Copyright Material; Answer of Defendant Susan C. Kimmell; Opinion; Findings of Fact and Conclusions of Law; Judgment and Declaration that Certain Manuscripts are not in the Public Domain, that the Defendant, Susan C. Kimmell, is the Sole Owner Thereof, and Restraining the Plaintiff from Using and Quoting from Said Manuscripts and a Certain Book Copyrighted by Said Defendant; Notice of Appeal and Designation of Record on Appeal which, together with original Reporter's Transcript of Proceedings on November 29, 1950, and original

Plaintiff's Exhibits 1 to 7, inclusive, and original defendants' exhibits A to G, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of February, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12862. United States Court of Appeals for the Ninth Circuit. Harwood A. White, Appellant, vs. Susan C. Kimmell and E. P. Dutton and Company, Inc., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 20, 1951.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 11540-Y

HARWOOD A. WHITE,

Plaintiff,

vs.

SUSAN C. KIMMELL, E. P. DUTTON AND
COMPANY, INC., a Corporation; DOE I,
DOE II, DOE III, DOE COMPANY, a Cor-
poration, and ROE COMPANY, a Corporation,

Defendants.

STATEMENT OF POINTS TO BE
PRESENTED ON APPEAL

I.

There is but one point to be raised upon this ap-

peal, the same being whether or not the evidence supports the trial court's findings on the question of whether or not there had been a sufficient publication of the work here involved by the author thereof prior to the claim of copyright of a portion thereof to have constituted a relinquishment of the common law rights in the work and the right to obtain a copyright thereon.

The foregoing was the single issue presented by the pleadings in the trial court and therefore all the evidence admitted is pertinent thereto. The issue was very narrow, prior publication was admitted but claimed by respondent to have been only a limited or special publication, the same was claimed by appellant to have amounted to a general publication. The question on appeal is whether or not the evidence shows the publication to have been limited and special as found by the trial court or general as contended by appellant.

Dated: March 1, 1951.

SCHAUER, RYON &
McMAHON,

/s/ THOMAS M. MULLEN,
/s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 2, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE CONTENTS OF THE
RECORD TO BE PRINTED ON APPEAL
AND STATEMENT OF POINTS ON AP-
PEAL

The above-named plaintiff, having appealed from the final judgment made and entered in the above-entitled action, does hereby designate the following portions of the record, proceedings and evidence to be included in the record on appeal.

A. Pleadings:

1. Plaintiff's Complaint
2. Answer of defendant Susan C. Kimmell
3. Plaintiff's Notice of Appeal

B. Judgment:

1. Memorandum Opinion of the Court
2. Findings of Fact
3. Conclusions of Law
4. Judgment

C. Evidence:

1. The entire reporter's transcript of the evidence which contains the following:

a. Testimony of Harwood A. White (pg. 10 et seq.)

b. Testimony of W. N. McGuire (pg 31 et seq.)

c. Testimony of Susan Crandall Kimmell (pg. 108 et seq.)

d. Deposition of Margaret Oettinger (pg. 61 et seq.)

e. Deposition of Harriett W. Jones (pg. 96 et seq.)

f. Deposition of Ivy Duce (pg. 140 et seq.)

g. Deposition of Don E. Stevens (pg. 167 et seq.)

2. Exhibits admitted in evidence as follows:

a. Plaintiff's Exhibit No. 3 in evidence

b. Defendant's Exhibit "A" in evidence

c. Defendant's Exhibit "B" in evidence

d. Defendant's Exhibit "C" in evidence

3. The following items being mimeographed manuscripts and a book are too long, bulky and extended to be included in the printed record and said items not being of a nature requiring the court to read them but only to see and examine the same, appellant moves that said exhibits be held by the clerk for inspection by the court in accordance with Rule 18 of the above-entitled court.

Dated: March 1, 1951.

SCHAUER, RYON &
McMAHON,

/s/ THOMAS M. MULLEN,

/s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 2, 1951.